

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 ATELIERS DE LA HAUTE-GARONNE (French : CIVIL ACTION
Corporation) and F2C2 SYSTEMS S.A.S. :
5 (French Corporation), :
:

6 Plaintiffs, :

7 v. :

8 BROETJE AUTOMATION-USA INC. (Delaware :
Corporation), BROETJE AUTOMATION GMBH :
9 (German Corporation), :

: NO. 09-598-LPS

10 Defendants.

11 - - -

12 Wilmington, Delaware
Thursday, April 10, 2014
13 *Jury Trial - Volume D*

14 - - -

15 BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J., and a jury

16 APPEARANCES:

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17 YOUNG CONAWAY STARGATT & TAYLOR, LLP
18 BY: MELANIE K. SHARP, ESQ., and
JAMES L. HIGGINS, ESQ.

19 and

20 KAYE SCHOLER, LLP
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JEFFREY H. HOROWITZ, ESQ.
(New York, New York)

22 and

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1 APPEARANCES: (Continued)

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17 and Broetje Automation GmbH

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23 P R O C E E D I N G S

24 (REPORTER'S NOTE: Jury trial proceedings were
25 held in open court, beginning at 9:45 a.m.)

1 THE COURT: Good morning, everyone.

2 (The attorneys respond, "Good morning, Your
3 Honor.")

4 THE COURT: Any issues from the plaintiffs?

5 MS. SHARP: Your Honor, I think we resolved the
6 issues enough to report on that in the first morning break
7 so the record is clear.

8 THE COURT: Okay. Fine. Any issues from the
9 defendant?

10 MR. CAHR: No, Your Honor.

11 THE COURT: Let's bring the jury in then.

12 (Jury returned.)

13 THE COURT: Good morning, everyone.

14 THE JURORS: Good morning.

15 THE COURT: I hope you didn't mind getting to
16 sleep in a little.

17 A JUROR: No, Your Honor. We didn't.

18 THE COURT: Whatever you did with your extra
19 time. We are ready to proceed. So I believe Dr. Budach is
20 on the stand; correct?

21 MR. KELLEHER: Yes, Your Honor.

22 THE COURT: We'll have Dr. Budach come back
23 please.

24 THE WITNESS: Sorry.

25 THE COURT: That's okay.

Budach - direct

1 MR. KELLEHER: I'm sorry, Your Honor.

2 THE COURT: Good morning to you, Dr. Budach.

3 THE WITNESS: Good morning.

4 THE COURT: I remind you that you remain under
5 oath.

6 THE WITNESS: Thank you.

7 ... STEFFEN BUDACH, having been previously
8 sworn, was examined and testified further as follows ...

9 THE COURT: Again, he is joined by the
10 translator. And, Mr. Kelleher, you may proceed.

11 MR. KELLEHER: Thank you, Your Honor.

12 DIRECT EXAMINATION (Continued)

13 BY MR. KELLEHER:

14 Q. Dr. Budach, we will get to the demonstrative slide we
15 were talking to you about yesterday. First, let me ask you,
16 is it accurate that the plaintiffs here also sued Broetje in
17 France?

18 A. Yes.

19 Q. What was the result in the trial court?

20 A. In the first instance, we won the litigation. And in
21 the second instance, we lost two of six claims. The second
22 decision stands, the decision, in Paris. Afterwards, we
23 went to the supplemental Court in France.

24 Q. And am I accurate that the plaintiffs also sued
25 Broetje in Germany?

Budach - direct

1 A. Yes.

2 Q. What was the result there?

3 A. Yes. There we won the first and the second instance.
4 And in both cases the Court decided that we do not infringe
5 or that Broetje does not infringe the patents of AHG. And
6 in the third lawsuit, in the German Patent Court, it has
7 been decided that AHG patent is invalid in view of the
8 Shinjo reference.

9 Q. Dr. Budach, yesterday we were looking at a summary
10 slide which we were trying to get on the screen but we are
11 having problems connecting.

12 Could you briefly, very briefly, summarize what
13 it is that you understood the examiner in the United States
14 prosecution to understand the meaning of grooves or
15 passageways to mean in the AHG patents?

16 A. Okay. Probably it's a bit difficult to understand
17 for the jury, what I am now explaining. I will try to
18 answer.

19 Okay. We have it.

20 That shows my opinion how the United States
21 patent examiner understood grooves. And I thought the
22 patent examiner meant grooves have to be something extra,
23 namely, that the groove, the groove has been cut or punched
24 into the wall of the rivet -- of the tube.

25 Q. Dr. Budach, how is that different from what is shown

Budach - direct

1 on the tube on the right?

2 A. On the right, that one, okay, that's the Broetje
3 structure. And we also consider the examination procedures
4 in the United States. And the United States examiner didn't
5 understand the corners of the Shinjo like grooves of AHG.
6 And why is it the case? Because the corners seem to be the
7 same like grooves at AHG, then he would not have gone into
8 the United States patents in light of Shinjo.

9 And that was my conclusion, that corners like
10 Shinjo doesn't infringe AHG patents. And that's why I
11 proposed, or I suggested to use corners like here to
12 transport the compressed air. And so we came to the
13 conclusion that there is no infringement of the AHG patents.

14 Q. Thank you very much, Dr. Budach.

15 A. Thank you.

16 Q. We mentioned the litigation in Germany and in France.
17 Could you tell us what is the status of those litigations
18 right now?

19 A. Yes. In both cases, we are, went to the separate
20 court and no case is finally decided. All cases are pending
21 in the German or the French separate court.

22 MR. KELLEHER: Thank you very much, Dr. Budach.
23 No further questions.

24 THE WITNESS: Thank you.

25 THE COURT: Thank you. We will have

Budach - cross

1 cross-examination.

2 THE WITNESS: I will use a translation of the
3 questions and from time to time I will decide whether I
4 answer English or not. It's okay?

5 THE COURT: It's okay if you need to.

6 MR. HOROWITZ: Your Honor, may I approach?

7 THE COURT: You may.

8 (Binders passed forward.)

9 CROSS-EXAMINATION

10 BY MR. HOROWITZ:

11 Q. Good morning, Dr. Budach.

12 A. Good morning.

13 Q. Now, you and I have actually never met before, have
14 we?

15 A. Yes.

16 Q. And your deposition was taken in this case. It was
17 taken by Mr. Lindvall; right?

18 A. Yes.

19 Q. Real quick. The German litigation that you were just
20 telling the jury about, the German decision was based on the
21 Shinjo patent; correct?

22 A. (Through translator): In Germany, we have two
23 different kinds of decisions. In the first instance, the
24 decision was with regard to the patents in Germany. And
25 then, before the German federal patent court, the validity

Budach - cross

1 of the patent was at stake. And in August of these cases,
2 the Shinjo reference played either a direct or indirect
3 role.

4 MR. HOROWITZ: Your Honor, may we approach?

5 THE COURT: Yes.

6 (Sidebar conference held.)

7 THE COURT: All right. Mr. Horowitz.

8 MR. HOROWITZ: During direct examination,
9 Dr. Budach spoke in English. In fact, during the
10 questioning of him at the beginning by defense counsel, he
11 declared that he spoke and wrote and read English and they
12 communicated all the time in English as part of the direct
13 examination.

14 Direct examination occurred without the use of
15 interpreter except occasionally, and suddenly Dr. Budach is
16 now using the interpreter, and I'm deeply concerned about
17 time. You have mentioned this at the beginning and it
18 just strikes me, the contrast. I would rather not have to
19 cross-examine him about that to the jury because I don't want
20 to look like the bad guy but the contrast is extraordinary.

21 THE COURT: All right. Well, what are you
22 proposing?

23 MR. HOROWITZ: I am not sure except that I think
24 that his use of an interpreter, perhaps you could ask him to
25 try to answer in English, just as he did for defense counsel.

Budach - cross

1 THE COURT: All right. Mr. Kelleher, what is
2 your view?

3 MR. KELLEHER: I don't think there has been any
4 abuse so far. The witness knew what I was going to be
5 asking him. We practice like we always practice with
6 witnesses on direct. And he is going to need a little bit
7 of help for cross-examination questions, especially when we
8 talk quickly. And this particular question, the way it was
9 asked about Shinjo, there were three different proceedings
10 in Germany where they had different issues with the Shinjo
11 reference, so that is why he gave a more complicated answer.
12 I think for complicated questions he will need the
13 assistance of an interpreter.

14 THE COURT: Do you have an objection to me
15 giving him an instruction at this time just saying: The
16 parties are under time constraints. Could you initially see
17 whether you could answer some of the questions in English,
18 and if you find you can't, then it is okay to use the
19 interpreter.

20 MR. KELLEHER: I don't object to that, just like
21 I didn't object when Mr. Bornes needed an interpreter when I
22 was cross-examining him.

23 THE COURT: That is how we will start. I will
24 politely remind him it is a timed trial, ask him to try his
25 best. If it turns out that you think it is being abusive

Budach - cross

1 or in any way wasting your time, then I will say the next
2 step is let's have another sidebar and I will consider
3 reallocating time. I don't think it's likely that I am
4 going to require him to testify without a translator.
5 Hopefully, we won't get to that point.

6 MR. HOROWITZ: Thank you, Your Honor.

7 THE COURT: All right.

8 (Sidebar conference ends.)

9 THE COURT: Dr. Budach, I would just like to --
10 you may know the parties are under time constraints, and
11 obviously it takes some time if we use the translator. If
12 you need the translator, that is fine, but I would ask you
13 if you could try initially and see if you could answer some
14 or all of the questions without the translator. Do you
15 understand?

16 THE WITNESS: Yes.

17 THE COURT: Okay. Thank you very much.

18 Mr. Horowitz.

19 BY MR. HOROWITZ:

20 Q. Dr. Budach, all three decisions in Germany that you
21 just described to the jury were based on something in the
22 Shinjo patent; correct?

23 A. Yes.

24 Q. Now, sir, you are employed by a company called CLAAS;
25 right?

Budach - cross

1 A. Yes.

2 Q. And CLAAS is a German company. You told us that.

3 A. Yes.

4 Q. And your job at CLAAS is Head of the Patent
5 Department; right?

6 A. Yes.

7 Q. And your office, you work in the headquarters at
8 CLAAS in Germany; correct?

9 A. Yes.

10 Q. And CLAAS bought Broetje, the defendant in this case,
11 in the Spring of 2003?

12 A. Yes. I guess in -- I was involved in this case at
13 first time in Summer or Autumn of 2003. I do not remember
14 exactly the time.

15 Q. Right. You told us in your deposition you got
16 involved in June of 2003, shortly after CLAAS brought
17 Broetje a couple months before that. Does that sound right?

18 A. My direct, my direct involvement was in 2005.

19 (Through translator): My personal involvement
20 happened in either Summer or Fall of that year. I had a
21 personal communication with Mr. Brinkies. That is what I
22 recall of that period.

23 Q. And CLAAS brought Broetje in the spring of 2003
24 before your communication that you just described?

25 A. Yes.

Budach - cross

1 Q. And CLAAS you told us has about 360 employees in the
2 United States?

3 A. Yes.

4 Q. And it's got --

5 A. Today. Today.

6 Q. Today. And it has around eight or 9,000 employees
7 around the world; right?

8 A. Today, we have about 10,000 employees because we
9 acquired a Chinese company and one Italian. I don't know.
10 I guess about 10,000.

11 Q. So about 10,000?

12 A. Today.

13 Q. Today.

14 A. But not in 2003.

15 Q. Around the world; right?

16 A. Yes.

17 Q. And CLAAS owned Broetje, you told us, until 2011?

18 A. I guess. Between 2011 and 2012. I do not remember
19 exactly when they sold Broetje.

20 Q. Now. Your employer CLAAS still has an interest in
21 the outcome of this case; correct?

22 A. We speak German.

23 (Through translator): We do have a contract or
24 an agreement with the new owners of Broetje, and they desire
25 that we kept on working with them.

Budach - cross

1 Q. You have what is called an indemnification agreement
2 or contract; right?

3 A. (Through translator): But that does not fall under
4 the scope of my activities. I can only talk to the
5 instructions I got from our management with whatever I have
6 to deal with.

7 Q. But your employer has a contract, CLAAS still has a
8 contract with the defendant. In fact, if the defendant
9 loses and the jury awards money, your company that you work
10 for is on the hook to pay for some or all of that judgment;
11 right?

12 A. (Through translator): I do not know the details but
13 it's possible that that is the case.

14 Q. Now, sir, do you understand me when I am asking you
15 these questions?

16 A. (Through translator): One or the other question, I
17 do understand.

18 Q. Okay. Let's keep going. As a CLAAS patent lawyer,
19 you provided advice to Broetje in the time frame of 2003,
20 2004, 2005; right?

21 A. Ya. Yes.

22 (Through translator): Yes.

23 Q. And you are testifying here today about that advice
24 you gave to Broetje; right?

25 A. Yes.

Budach - cross

1 Q. And you understand that what the jury is going to
2 be looking at today and has been looking at is whether that
3 advice was given to Broetje in good faith; right?

4 A. (Through translator): And they were given in good
5 faith because we did not want to infringe the patents.

6 Q. Your main job, you told the jury yesterday -- this is
7 what you said. Your main job is to monitor our products in
8 the patent publications of our competitors to avoid patent
9 infringement. That is your main job; right?

10 A. (Through translator): Yes. That is one of the most
11 important responsibilities I do have. That together with my
12 team, we make sure that no third-party patents are infringed.

13 Q. You make sure of that; right?

14 A. Yes.

15 Q. And you made sure that you are telling the jury in
16 the case of Phillippe Bornes' patent; correct?

17 A. (Through translator): As I explained some minutes
18 ago, yes.

19 Q. Now, sir, you are a German patent attorney; correct?

20 A. Yes.

21 Q. And you understand this case before this jury in this
22 courtroom involves two United States patents; correct?

23 A. Ya. (Speaking German.)

24 Q. And I think the jury -- I'm sorry.

25 A. (Through translator): Yes. This has to do with the

Budach - cross

1 training I received as a patent lawyer because that also
2 pertains to international law.

3 Q. You told the jury yesterday that you studied United
4 States law as part of your schooling to become a German
5 patent lawyer; right?

6 A. Yes.

7 Q. You understand, do you not, that patent law is not
8 the same in every country?

9 A. Yes, I did understand it, but it is, it is quite
10 similar, especially where we talk about here about novelty
11 or anticipation and obviousness means inventive step.

12 Q. Sir, German patent law is not exactly the same as
13 United States patent law, is it?

14 A. Yes, it is not exactly the same. Of course.

15 Q. And you went to school. You were trained in Germany;
16 right?

17 A. Yes.

18 Q. You are not a United States patent attorney; correct?

19 A. Yes, that is correct.

20 Q. You are not qualified as a United States lawyer; is
21 that correct?

22 A. Yes, that's correct.

23 Q. You have never taken a bar exam here in the United
24 States?

25 A. Ya. Yes, that is correct.

Budach - cross

1 Q. You are not licensed to practice law here in the
2 United States?

3 A. Yes.

4 Q. Yes?

5 A. Ya. (Speaking German.)

6 (Through translator): Yes, that is correct. I
7 never studied law in the United States, nor did I ever
8 practice in the United States.

9 Q. And the answer to my question: Nor do you have a
10 license to practice in the United States?

11 A. I'm not a United States patent attorney or lawyer.
12 I'm just a German patent lawyer and a European patent
13 lawyer. There is two patent lawyer degrees, what I have.

14 Q. German and European; correct?

15 A. Yes.

16 Q. And, in fact, you have no formal training in
17 determining infringement under United States patent law, do
18 you?

19 A. (Through translator): When we do the German and
20 European training or when we study to become a German or
21 European patent attorney, we do focus on some specific
22 topics regards U.S. patent law. And these topics involve
23 novelty and the inventory step and there is no difference.

24 Q. Sir, you gave a deposition in this case. Do you
25 remember?

Budach - cross

1 A. Yes.

2 Q. You testified under oath just as you are today?

3 A. Yes.

4 Q. My partner, Mr. Lindvall, asked you questions.

5 A. In 2011 or when?

6 Q. Before we came in to talk to this jury today, you
7 answered questions under oath; correct?

8 A. Ya.

9 (Through translator): Yes.

10 MR. HOROWITZ: Page 22, line 13 to page 22, line
11 15 from that deposition, Your Honor.

12 THE COURT: You may play it.

13 "Question: Did you have any formal training on
14 determining infringement under U.S. patent law?

15 "Answer: No."

16 BY MR. HOROWITZ:

17 Q. Now, part of your job is to help protect the
18 intellectual property of CLAAS; right?

19 A. Yes.

20 Q. You make sure the patents are filed for CLAAS and its
21 subsidiaries like Broetje?

22 A. Yes.

23 Q. And you filed patents on Broetje's inventions and
24 CLAAS's inventions to protect the company's inventions;
25 right?

Budach - cross

1 A. Yes.

2 Q. You would expect a company to pay CLAAS or Broetje
3 for the right to use its intellectual property?

4 A. (Through translator): I am employee of company
5 CLAAS. And in this case, I am just like any other employee
6 working for a company responsible for this particular
7 domain.

8 Q. Okay. Forgive me. That is not the question I asked.
9 So let me try it again, sir.

10 A. Ya.

11 Q. You would expect a company to pay CLAAS were it to
12 use one of CLAAS's inventions that was under patent
13 protection?

14 A. (Through translator): If other companies use CLAAS's
15 inventions, then we need to come to some kind of agreement.
16 It does not need to be a financial agreement but it can also
17 be something like a cross-licensing agreement.

18 Q. If a company used one of CLAAS's inventions, a
19 patented invention without CLAAS's permission, you would
20 consider taking action against that company; correct?

21 A. (Through translator): No. In the first step, we
22 would have discussions or conversations with that company.

23 Q. Well, you told us yesterday, you told the jury -- I
24 have the transcript from yesterday so I got to read it last
25 night, and here is what you said. You said: What we expect

Budach - cross

1 is that competitors respect our patent rights and the same
2 applies for us.

3 Didn't you tell the jury that yesterday, about
4 4:15 in the afternoon?

5 A. Yes.

6 Q. Now, when you got involved in 2003, in the summer of
7 2003, with Broetje in this issue of making cassettes, you
8 told the jury you needed to do research to see if there were
9 patents covering the cassette; right?

10 A. Yes.

11 Q. In fact, Broetje already had the patents on this
12 cassette, did they not?

13 A. (Through translator): I do not understand how you
14 mean that question. What do you mean by that question?

15 Q. All right. I will show you what I mean. You can
16 look at my binder, PTX-167. This is in evidence.

17 A. (Through translator): What is it, PTX-167?

18 Q. Yes.

19 A. (Through translator): Yes.

20 (The Witness in English): Okay. I have it.

21 Q. I just want to ask you, yesterday, Dr. Budach, when
22 Mr. Kelleher was asking you questions, you were asked the
23 following question and you gave the following answer:

24 "Question: Dr. Budach, could you tell us how
25 well, you speak English?

Budach - cross

1 "Answer: I would say well enough to understand
2 and to speak and to read English text."

3 Is that what you said yesterday?

4 A. Yes.

5 Q. And, in fact, Mr. Kelleher asked you:

6 "Question: What language did you and I use to
7 speak to each other?

8 "Answer: We, all the time we talk, we are
9 talking in English."

10 Correct?

11 A. Mr. Kelleher and I talk all the time in English.
12 Yes.

13 Q. Now, coming back to my questions here in this
14 courtroom today while I'm asking you questions. Let's take
15 a look at PTX-167.

16 This is a letter dated January 4, 2000 to
17 Mr. Phillippe Bornes, who is sitting right here, to
18 Dr. Holtmeier of Broetje. Do you see that there?

19 A. Yes. (Speaking German.)

20 (Through translator): I see that, yes.

21 Q. And he says: I send you the patent we had in Europe
22 so that it will be also in German, this is on the rifles
23 into the tube.

24 Do you see that there?

25 A. (Speaking German.)

Budach - cross

1 Q. I'm just asking if you see it.

2 A. (Through translator): Well, this, that is written
3 here, but this letter dates from the year 2000, and it is a
4 letter drafted by Mr. Bornes to Mr. Holtmeier.

5 Q. Right. We got it.

6 A. (Through translator): And we just established that
7 we started working in 2003.

8 Q. Exactly. I'm not a mathematician but 2003 is three
9 years after 2000; right?

10 A. (Through translator): I am not a mathematician
11 either but that is correct.

12 Q. So we can agree then that Broetje had in its files
13 the patent covering this invention, Mr. Bornes' invention
14 from the very first second you got involved in this case.

15 A. (Through translator): I don't know whether this
16 letter pertains to the patent which we are working on right
17 now.

18 Q. Well, let's turn the page then. PTX-167.2. Let's go
19 one more page.

20 Sir, that is the patents you are working on in
21 this case, is it not?

22 A. Yes. (Speaking German.)

23 (Through translator): Yes, but there is no link
24 here between this letter and the patent.

25 Q. That's the European version of the United States

Budach - cross

1 patents at issue in this case?

2 A. Yes.

3 Q. Okay. Now, you found the patents yourself in 2003;
4 right?

5 A. I don't understand this question.

6 Q. You did a patent search in September 2003?

7 A. Yes.

8 Q. Okay. And you found the United States patents;
9 right?

10 A. Yes.

11 Q. Will you do your best to speak English to me like you
12 did to Mr. Kelleher? Will you do that for me?

13 A. Until now, I didn't hear your accent. That is a
14 little bit tricky for me to answer or to understand each
15 question correctly.

16 Q. As the head of the Patent Department at CLAAS, you
17 had the ability to seek advice from United States counsel;
18 correct?

19 A. Yes. (Speaking German.)

20 (Through translator): Yes, but we used this
21 only if for some reason we think that is necessary to use
22 such a service.

23 Q. You made a decision here you didn't think that was
24 necessary. Is that what you are saying?

25 A. (Through translator): It has to do with the fact

Budach - cross

1 that the claims and the technical description are
2 essentially the same.

3 Q. They're not identical, are they?

4 A. (Through translator): There are some deviations for
5 the U.S. patents were separately issued for processes and
6 for instruments or apparatus.

7 THE WITNESS: In Europe --

8 MR. HOROWITZ: You answered my question.

9 Your Honor, can I approach?

10 THE COURT: Yes. Doctor, you have answered the
11 question. We'll have a sidebar.

12 (Sidebar conference held.)

13 MR. HOROWITZ: Ms. Sharp would like to argue
14 this.

15 THE COURT: Speak up.

16 MS. SHARP: He continues to use the interpreter
17 for the questions and answers without making any effort to
18 comply with Your Honor's request that he try to communicate
19 in English. When the interpreter asks him a question in
20 German, he then, it induces him to respond in German. And
21 principally the interpreter is being used to elaborate on
22 answers.

23 My observation is that it's turning into a
24 situation where it's an abuse of the time. I understand
25 the position that Your Honor is in in denying somebody an

Budach - cross

1 interpreter so our request is that we simply get an
2 adjustment in the time taken into account.

3 THE COURT: Do you have any specific proposal as
4 to how to do that?

5 MS. SHARP: I think at the end of the testimony,
6 we would have to add up the time, compare it against how
7 long the examination would have been done or how long it
8 would have taken in English --

9 THE COURT: Right.

10 MS. SHARP: -- had he done what he did yesterday.

11 THE COURT: Mr. Kelleher.

12 MR. KELLEHER: I think the witness is actually
13 trying quite well to answer in English. The translator is
14 trying to do simultaneous translation to do things. Just
15 before he walked over here, he was trying to answer
16 something in English as well.

17 We ran into the same problem with Mr. Bornes and
18 we didn't ask for time. He used the interpreter quite a bit
19 when I was cross-examining him.

20 THE COURT: I don't recall it being nearly as
21 much delay or an inhibition on the ability to cross-examine
22 with Mr. Bornes.

23 What I think would be appropriate is if I charge
24 one-third of the cross-examination time to the defendants,
25 because among other things, my ability to jump in and say,

Budach - cross

1 for instance, you have already answered the question or it
2 just called for a yes or no is hampered by the fact I don't
3 speak German so I don't know for sure he is not just saying
4 yes in a very long way. And I think that from where we are
5 now, it would be fair going forward if I charge a third of
6 whatever time it has taken to complete the cross-examination
7 to the defendants.

8 Is there anything else?

9 MR. HOROWITZ: No, Your Honor.

10 THE COURT: Ms. Sharp?

11 MS. SHARP: No, Your Honor.

12 THE COURT: Is there anything else?

13 MR. KELLEHER: We understand the ruling.

14 THE COURT: Okay. Thank you.

15 (Sidebar conference ends.)

16 THE COURT: You may continue.

17 MR. HOROWITZ: Thank you, Your Honor.

18 BY MR. HOROWITZ:

19 Q. Dr. Budach, you have lawyers -- you have consulted
20 with lawyers in the past to get opinions or advice about
21 patents and infringement, United States lawyers; correct?

22 A. (Through translator): Up to this point, we did not
23 use such advice or consultations.

24 Q. Are you saying that you didn't consult with United
25 States lawyers? You didn't have the ability to do that in

Budach - cross

1 2003? That wasn't something you did?

2 A. (Through translator): I am talking with regards to
3 this case. We did not use the advice, separate advice of
4 U.S. patent attorney.

5 Q. Right. You answered my next question. You had the
6 ability to do that; correct?

7 A. Yes.

8 Q. You choose not to do that.

9 A. (Through translator): We only used the U.S. patent
10 attorneys with regards to issuing the file history.

11 Q. Okay. You didn't get an opinion from United States
12 lawyers relating to infringement of these United States
13 patents?

14 A. (Speaking German.)

15 Q. That's a yes or no question. That's nein or ya.
16 Either you did or you didn't. You did not get an opinion
17 from United States lawyers relating to infringement of these
18 United States patents? Yes or no.

19 A. Okay. If it is a yes or no question, then I would
20 say no, we haven't used any assistance from United States
21 patent lawyers.

22 Q. And here is another yes or no question. You did
23 not get an opinion from United States lawyers relating to
24 validity of these United States patents?

25 A. Nein. No.

Budach - cross

1 Q. You did not; correct?

2 A. Yes.

3 Q. Let's turn in your binder to DTX-1602.

4 Are you -- it's the big binder. The defense
5 binder. This is a document Mr. Kelleher asked you about.

6 A. Which number?

7 Q. It's up on the screen. DTX-1602.

8 You talked to the -- I'm sorry. This thing is
9 driving me crazy. (Referring to microphone.)

10 You talked to the jury yesterday about this
11 document with Mr. Kelleher?

12 A. Yes.

13 Q. You didn't show certain parts of this document to the
14 jury, did you?

15 A. (Through translator): But not intentionally. Nobody
16 asked me to see that.

17 Q. Mr. Kelleher didn't ask you. He didn't point you
18 there, did he?

19 A. Ya.

20 (Through translator): Yes. But I mean you can
21 ask me those questions.

22 Q. Thank you. Thank you. I'm going to do that. I just
23 want to make sure the jury knows what this is. This is
24 December 2nd, 2003. This is the report you prepared after
25 you told us you did a patent search and found Mr. Bornes'

Budach - cross

1 patent.

2 THE COURT: Is that a question, Mr. Horowitz?

3 MR. HOROWITZ: Yes.

4 BY MR. HOROWITZ:

5 Q. Correct?

6 A. That was a question?

7 Q. Yes.

8 A. Okay. Yes, that is my report to the patent issues
9 between AHG and Broetje.

10 Q. And this is December 2nd, 2003; right?

11 A. That's the written document. Yes.

12 Q. If you go down to the first paragraph here, it says:
13 On the open questions, we would like to comment as follows:

14 And it says -- no, a little above that. There
15 we go. Yes. No, in between. I'm sorry, Jeff.

16 On the open questions, we would like to comment
17 as follows:

18 Do you see that?

19 A. On the open question, we would like to comment as
20 follows:

21 Q. Just answer.

22 A. Yes. I say yes.

23 Q. Let's look at the very first open question you
24 address.

25 Just in the first paragraph there, Jeff.

Budach - cross

1 It says: From the meeting minutes of September
2 29, 2003, Item 1, and in consultation with Mr. Neugebauer on
3 November 6, 2003, of particular importance is the profiled
4 tube of the AHG cassette as well as the general design.

5 Correct?

6 A. Yes.

7 Q. And the "particular importance" of the AHG cassette
8 was the patents that covered it; right?

9 A. Yes, that's right.

10 Q. And if you go down to the next paragraph.

11 A. Okay.

12 Q. You say: We first wish to draw attention to the AHG
13 patent.

14 A. Yes.

15 Q. And it gives the patent number. That is the European
16 version of Mr. Bornes' patent; correct?

17 A. Yes.

18 Q. You were concerned about whether there was an
19 infringement with the product that Broetje was developing of
20 Mr. Bornes' patent?

21 A. Yes, we were worried any patent infringement, and
22 that's why we have to investigate it.

23 Q. My question is you were concerned about infringement,
24 right?

25 A. (Through translator): It was not so that I was

Budach - cross

1 concerned, it is our responsibility, my responsibility to
2 avoid any kind of patent infringement.

3 Q. It was your responsibility to avoid patent
4 infringement; correct?

5 A. Yes.

6 Q. And to make sure Broetje, the company you were
7 advising, avoided patent infringement?

8 A. Yes, that was and is my responsibility. Do not
9 infringe any patents. Not copying, do not infringe.

10 Q. Don't copy, don't infringe; right?

11 A. Don't copy, don't infringe patents.

12 Q. Let's go to the next page here.

13 A. Next page?

14 Q. For the record, it's, yes, 1602.2. It's just the
15 second page.

16 It's in the planned cassette. Do you see that,
17 Jeff? The planned cassette design. The top of the first
18 paragraph.

19 You didn't show this to the jury yesterday, did
20 you?

21 Let's read it together. "The planned cassette
22 design, in particular the tube/rivet head diameter, the
23 connection pieces and the grooves, must be specified in
24 greater detail, in order to be able to rule out an
25 infringement."

Budach - cross

1 Did I read that correctly?

2 A. Yes.

3 Q. And you were referring to Mr. Bornes' patent; correct?

4 A. Yes.

5 Q. And you were unable, in December of 2003, to rule out
6 an infringement; correct?

7 A. Ya. (Speaking German.)

8 THE COURT: Do you want a yes or a no?

9 MR. HOROWITZ: I would hope, yes, Your Honor.

10 THE COURT: Dr. Budach, when you can, answer the
11 questions yes or no. And then if counsel wants more
12 explanation, he will ask for it.

13 Would you ask the question again.

14 THE WITNESS: Okay. I understand. Okay.

15 BY MR. HOROWITZ:

16 Q. In December of 2003, you were unable to rule out an
17 infringement of Mr. Bornes' patent; correct?

18 A. No.

19 Q. "In order to be able to rule out an infringement,"
20 that's what the words say; right?

21 A. In the German one, it is written. (Speaking German.)

22 MR. HOROWITZ: Objection.

23 THE COURT: The question is, is that what the
24 words say in English?

25 BY MR. HOROWITZ:

Budach - cross

1 Q. That is what the words say in the certified English
2 translation; correct?

3 A. Yes. Okay.

4 Q. You also testified about this in deposition; right?

5 A. I guess, yes.

6 Q. Page 84, line 12 to page 84, line 17 of your
7 deposition.

8 "Question: Okay. So as of this particular
9 date, on December 2nd, 2003, until you received the
10 information about the tube/rivet head diameter, the
11 connection pieces and the grooves, the more detail, that you
12 could not rule out infringement, correct?

13 "Answer: Yes."

14 You provided no other written reports, written
15 reports with respect to infringement to Broetje of AHG's
16 patents until 2005; is that correct?

17 A. (Through translator): No written reports, yes.

18 Q. Now, this document, DTX-1602, was written in 2003,
19 December of 2003; right?

20 A. Yes.

21 Q. And this was your written report to Broetje about
22 your prior art search; right?

23 A. (Speaking German.) Yes.

24 Q. I'm sorry. You said yes.

25 A. (Through translator): Okay.

Budach - cross

1 THE COURT: But he said other things before
2 "yes."

3 MR. HOROWITZ: I'm sorry. I heard the yes.

4 BY THE WITNESS:

5 A. (Through translator): For the development stage at
6 that time of the cassette, yes.

7 Q. They ruled out the cassette before you gave them
8 another written opinion, did they not?

9 A. (Through translator): A written opinion, but we were
10 in direct contact for the whole entire time.

11 Q. Written opinion was my question.

12 A. Yes. Yesterday I called about the CLAAS Broetje --

13 Q. I didn't ask you anything about whether you gave them
14 any written opinion.

15 A. Sorry. Sorry. Yes. No written opinion until 2005.
16 Yes.

17 Q. And this report is one, two, and if you go to the
18 next page, it's about four paragraphs long; right?

19 A. It depends on what the paragraph is.

20 Q. On Mr. Bornes' patent, it's four paragraphs. You
21 wrote four paragraphs where you said you couldn't rule it
22 out; right?

23 A. It depends on what do you mean the paragraph.

24 Q. I'll tell you what I mean. Let's go back. I thin,
25 everybody knows but we'll go back.

Budach - cross

1 One paragraph, two paragraphs. Do you see the
2 laser pointer? Three paragraphs, four paragraphs. Do you
3 see that?

4 A. Okay. Yes.

5 Q. That was your written report of 2003.

6 A. And all the next pages of this written opinion.

7 Q. Is about Mr. Bornes' invention? It's only this
8 section; right?

9 A. Okay. (Speaking German.)

10 (Through translator) the entire report is
11 about a cassette system, per se.

12 Q. You came into court yesterday with a slide. Do you
13 remember that?

14 A. Yes.

15 Q. Do you see this? You showed this to the jury?

16 And you can take it down for the jury.

17 A. Yes.

18 Q. You created that at 10:00 o'clock on Wednesday night,
19 did you not? Tuesday night.

20 I'm sorry. I withdraw the question.

21 You created this slide at 10:00 p.m. on
22 Wednesday night; correct?

23 A. (Through translator): You mean Tuesday or Wednesday?

24 Q. I mean Tuesday.

25 A. Okay. (Speaking German.)

Budach - cross

1 (Through translator): Well, that day, yes. I
2 don't recall the point in time. We were busy.

3 Q. You were busy working with Mr. Kelleher. Right?

4 A. (Through translator): No.

5 Q. You came into court and testified about that slide
6 that you made at 10:00 the night before that talked about
7 the Shinjo reference. Right?

8 A. (Through translator): Yes.

9 Q. Your report in December 2003 doesn't talk about the
10 Shinjo reference, does it?

11 A. (Through translator): The report went to our
12 development department. And for the development
13 department --

14 MR. HOROWITZ: Objection. Move to strike.
15 Non-responsive. It was a yes or no question.

16 THE COURT: That is granted.

17 Dr. Budach, you can answer yes or no.

18 Do you want the question again?

19 THE WITNESS: Yes.

20 BY MR. HOROWITZ:

21 Q. In your December 2003 report you do not cite the
22 Shinjo reference, do you?

23 A. (Through translator): No.

24 Q. Your report in 2003 doesn't contain the pictures that
25 you created at 10:00 p.m. the night before you came in to

Budach - cross

1 testify before this jury, does it?

2 A. No.

3 Q. Now, in 2005 you wrote another report?

4 A. (Through translator): The further report, yes.

5 Q. That was actually an e-mail that you wrote. Correct?

6 A. I don't know. Probably, yes.

7 Q. You showed it to the jury yesterday. Let's pull up

8 DTX-1605.

9 A. Let me look, okay.

10 Yes.

11 Q. This e-mail was written on September 8, 2005, after

12 the German litigation was getting under way. Correct?

13 A. I don't know when the German case started exactly.

14 Q. You wrote this e-mail to advise Broetje of what your

15 position was within the context of the German proceeding.

16 Correct?

17 A. Yes.

18 Q. And at that time, this was now two years after

19 Broetje had developed its cassettes or begun its development

20 of its cassettes?

21 A. (Through translator): In 2003 the cassette was not

22 fully developed yet.

23 Q. It was under development. Correct?

24 A. Yes.

25 Q. And you were consulted in 2003, as you have told us

Budach - cross

1 several times, as part of that development?

2 A. Yes. Between 2003 and 2005.

3 Q. Let's make this simple. You wrote this opinion after
4 Broetje had begun selling its cassettes. Correct?

5 A. This final statement, yes.

6 Q. And at the time you wrote this e-mail in September of
7 2005, you still had not obtained an opinion from United
8 States lawyers about the United States versions of these
9 patents. Correct?

10 A. Yes.

11 Q. The opinion that you wrote in this e-mail in
12 September of 2005 was never reviewed by any United States
13 lawyers. Correct?

14 A. (Through translator): Not before I wrote it.

15 Q. When you sat down and wrote this e-mail, that's
16 right, it was never reviewed, you never consulted with,
17 never got any input from a United States lawyer, did you?

18 A. Yes.

19 Q. And this e-mail is the entirety -- let's show the
20 Court, let's show, this is your opinion in 2005 about
21 infringement?

22 A. Yes.

23 Q. Let me just clarify, when you said yes to my last
24 question, just so we are clear, what you meant was you did
25 not get an opinion from a United States lawyer or any input

Budach - cross

1 from a United States lawyer when you drafted this e-mail?

2 A. (Through translator): We are talking here about the
3 same claims and the same descriptions for that --

4 MR. HOROWITZ: Objection. Move to strike.
5 Nonresponsive. It is a yes or no question.

6 THE COURT: I will grant the motion to strike.
7 If you are trying to clarify the record, you are going to
8 have to give him a little chance to explain.

9 MR. HORWITZ: I apologize.

10 THE TRANSLATOR: Should I finish, Judge?

11 THE COURT: No. But counsel can ask another
12 question if he wants.

13 BY MR. HOROWITZ:

14 Q. It is a yes or no question. When you sat down at
15 your keyboard and wrote this e-mail, you had not consulted
16 with or gotten any input from a United States lawyer?

17 A. (Through translator): Not pertaining to the AHG
18 patents.

19 Q. This e-mail that you wrote in September 2005 was the
20 entirety of your written opinion to Broetje. Correct?

21 A. Yes, in 2005, in this e-mail.

22 Q. When you wrote this -- let's look at how long this
23 e-mail is. You got one page. Let's go to the next page.
24 It's about almost a page and a half. Right?

25 A. Yes.

Budach - cross

1 Q. And again, you came in and showed the jury a slide
2 that you created the night before you came in and testified
3 that talked about the Shinjo reference. Correct?

4 A. Yes.

5 Q. DTX-1605, your September 2005 e-mail, contains no
6 discussion of Shinjo. Correct?

7 A. Yes.

8 Q. It's correct Shinjo is not in there?

9 A. (Through translator): Only not, it is not contained
10 in this e-mail to the management.

11 Q. And the pictures on the slide that you created the
12 night before you came to talk to the jury, they are not in
13 there, either, are they?

14 A. (Through translator): The slide I showed yesterday,
15 which you saw this morning was not contained in there, of
16 course.

17 Q. Now, you talked to the jury about some of the foreign
18 or, I will call them foreign, the French and German
19 decisions outside of the United States. Correct?

20 A. Yes.

21 Q. And you mentioned the French Court's ruling. Right?

22 A. Yes.

23 Q. Now, before the ruling, the recent ruling from the
24 French Court, you had never given a written opinion to
25 Broetje about whether its cassettes infringed the trade

Budach - cross

1 dress of AHG's cassettes?

2 A. (Through translator): The trade dress was not
3 infringed. We always took into consideration the physical
4 aspect of the cassette.

5 Q. That is not what the French Court said, is it?

6 A. (Through translator): The Court, the second instance
7 Court in France decided that there were more similarities
8 here contained but they did not follow the rule that form
9 follows function.

10 MR. HOROWITZ: Let me move to strike as
11 nonresponsive. It was a yes or no question.

12 THE COURT: I will overrule that one.

13 BY MR. HOROWITZ:

14 Q. Let's pull up the French decision. This is it right
15 here. PTX-613T. Right? You recognize that?

16 A. (Through translator): Is that in the binder?

17 Q. It's in the smaller binder. You talked to the jury
18 about this opinion when Mr. Kelleher asked you questions.
19 Right?

20 Before we look at this, I am going to ask you
21 the following question again: You never gave Broetje a
22 written opinion about whether its trade dress infringed AHG
23 and F2C2's cassettes, did you?

24 A. (Through translator): You do have all the written
25 statements I ever made and I do not remember all the

Budach - cross

1 details.

2 Q. It's a yes or no question. Did you give them a
3 written opinion on trade dress? Yes or no?

4 A. No.

5 Q. Now, the French Court found -- let's go to 613T.23 --
6 you said something about some similarities. Let's go to the
7 third paragraph from the bottom. It says in the third line
8 there towards the end, "...this company commercializes
9 cassettes that are identical to those from AHG at F2C2
10 system."

11 Correct?

12 A. I am looking for this page.

13 Q. You can see it up here, sir. Those are what the
14 words in the opinion say. That's all I am asking.

15 A. Okay.

16 Q. Yes?

17 A. (Through translator): That is written there, yes.

18 Q. After you got this opinion, you spoke to employees of
19 Broetje. Right?

20 A. Yes.

21 Q. And you told them, you gave instructions to them to
22 change the appearance of their cassettes. Correct?

23 A. (Through translator): Because of the decisions which
24 were given in the world with regards to the cassette and in
25 our country the third instance.

Budach - cross

1 Q. Yes or no? You got this opinion, you told Broetje
2 they had to change the exterior appearance of their
3 cassettes. Correct?

4 A. After conversation with the French lawyers, yes.

5 Q. And they did so, did they not?

6 A. Yes.

7 MR. HOROWITZ: Your Honor, may I approach?

8 THE COURT: You may.

9 BY MR. HOROWITZ:

10 Q. PTX-650, can you see it from there, sir?

11 A. (Through translator): I see it.

12 Q. This is how Broetje, PTX-650, redesigned their
13 cassette after you told them they had to. Correct?

14 A. (Through translator): This was according to the
15 recommendation we received, or the consultation with our
16 French lawyers.

17 Q. You told them to make a different cassette. Right?

18 A. Yes.

19 Q. I want to go back to your 2005 e-mail opinion. You
20 have told us several times that CLAAS designs around
21 patents. Correct?

22 A. Yes.

23 Q. You told us, in fact, that CLAAS is not allowed to
24 infringe any patents. Correct?

25 A. Yes.

Budach - cross

1 Q. And you told us yesterday, you told all of us, the
2 Judge, jury, everybody in this courtroom, that CLAAS expects
3 competitors to respect our patents, and the same applies for
4 us. Right?

5 A. Yes.

6 Q. Turning back to DTX-1605, this is your September 2005
7 opinion, there is something else in this opinion you didn't
8 show the Judge or jury. Isn't there?

9 A. I don't know what you mean.

10 Q. Let's turn to DTX-1605.2. This is at the conclusion
11 of your September 2005 e-mail to Broetje?

12 A. Yes.

13 Q. Let's read the last two sentences of your e-mail to
14 Broetje in September of 2005. I will read them to you.

15 "With deliberate use of third-party property
16 rights, CLAAS-internal management approval would have to be
17 obtained."

18 Did I read that correctly so far?

19 A. Yes.

20 Q. It says, "Deliberate use of third-party property
21 rights."

22 That's what it says. Correct?

23 A. Could we go to the German version?

24 Q. That's what it says in English, the certified English
25 translation. Correct?

Budach - redirect

1 A. Yes.

2 Q. "With deliberate use of third-party property rights,
3 CLAAS-international management approval would have to be
4 obtained. We could possibly discuss briefly by phone
5 beforehand whether that is necessary here."

6 Did I read that correctly?

7 A. No. It's not "CLAAS international." It's "CLAAS
8 internal" management.

9 Q. Then I will read it again.

10 "With deliberate use of third-party property
11 rights, CLAAS-internal management approval would have to be
12 obtained. We could possibly discuss briefly by phone
13 beforehand whether that is necessary here."

14 Did I read it correctly that time, sir?

15 A. Yes.

16 MR. HOROWITZ: No further questions, Your Honor.

17 THE COURT: Redirect.

18 REDIRECT EXAMINATION

19 BY MR. KELLEHER:

20 Q. Dr. Budach, I am going to ask you a question about
21 the same document that we were just looking at.

22 A. Okay. It's not necessary, but we could use it.

23 Q. So we are going to look at DTX-1605, your 2005
24 e-mail. We are going look at the very bottom paragraph.

25 Dr. Budach, am I reading this correctly: "If Broetje,

Budach - redirect

1 instead of the cylindrical cross-section, uses a pentagonal
2 cross-section, there is already no infringement according to
3 the wording."

4 A. Yes.

5 Q. Dr. Budach, we looked at a portion of the French
6 Appellate Court ruling. Did the French Appellate Court --
7 was it correct?

8 MR. HOROWITZ: Objection, Your Honor.

9 THE COURT: What is the basis of the objection?

10 MR. HOROWITZ: Calls for argument and calls for
11 an opinion this witness --

12 THE COURT: Are you withdrawing that question?

13 MR. KELLEHER: I withdraw the question.

14 BY MR. KELLEHER:

15 Q. Do you agree with the French Court Appellate
16 judgment?

17 A. (Through translator): We are not in agreement with
18 the decision of the French Appellate Court.

19 Q. Why not?

20 A. (Through translator): In France, European patent law
21 applies.

22 (In English): And an infringement is defined by
23 looking into the claims. And the Judge has to compare each
24 claim with the probably French solution.

25 Q. Dr. Budach, let me withdraw that question and ask

Budach - redirect

1 this question: Do you agree with the French Court decision
2 that Broetje was selling an identical cassette?

3 A. No.

4 Q. Why not?

5 A. (Through translator): Because there is neither an
6 infringement of the trade dress nor an infringement of the
7 patent.

8 MR. KELLEHER: That will be the end of it, Your
9 Honor.

10 THE COURT: Okay. Dr. Budach, you may step
11 down. Thank you.

12 THE WITNESS: Thank you.

13 (Witness excused.)

14 THE COURT: Who is going to be next?

15 MR. KELLEHER: Your Honor, we have a deposition
16 video next.

17 THE COURT: About how long?

18 MR. KELLEHER: About 20 minutes.

19 THE COURT: We'll take a break then. We will
20 give the jury maybe a little bit shorter break than normal
21 since we started a little bit late.

22 No talking about the case during the break.

23 We'll get you back in the courtroom.

24 (Jury left courtroom.)

25 THE COURT: All right. I just wanted to talk

1 briefly about the jury instructions. Have a seat, if you
2 wish. And also, I don't know. Any progress, Ms. Sharp? Do
3 you know, on the other issue, whether you have an issue?

4 MS. SHARP: We haven't had a chance.

5 THE COURT: All right. Just briefly on the jury
6 instruction issues, primarily the ones in the letters.

7 On preemption, do the defendants have a response
8 to the plaintiffs' argument that there are multiple elements
9 to the California claim and, therefore, it's not really
10 directed just to patent infringement?

11 MR. KELLEHER: I can respond, Your Honor.

12 First, I want to correct myself one thing I said
13 yesterday when we were speaking somewhat extemporaneously.

14 I don't think field preemption is at issue here.
15 I think it is conflict preemption. I do think there is
16 conflict preemption here for the reason that it is for
17 Congress to define what remedies are available for infringing
18 a patent, and they have said you can get punitive damages in
19 the form of exceptional case.

20 THE COURT: And I understood that argument, but
21 why should I view it as a penalty for patent infringement as
22 opposed to a penalty for unfair competition, one of the many
23 elements of which may be shown by patent infringement?

24 MR. KELLEHER: Because, Your Honor, it imposes a
25 lower burden of proof preponderance to give the kind of

1 damages, punitive, that Congress has determined can only be
2 granted by clear and convincing evidence.

3 THE COURT: While you are up there, feel free to
4 pass the baton as it were, if you wish.

5 On damages for trade dress infringement, the
6 plaintiffs have proposed an alternative construction. I
7 want to know if defendants have an objection to that
8 alternative.

9 MR. KELLEHER: I don't know, Your Honor.

10 THE COURT: That's fine.

11 MR. KELLEHER: I'll see if one of my colleagues
12 do.

13 THE COURT: Fair enough. Essentially it doesn't
14 specifically say rivets. It doesn't specifically say
15 cassettes or the other elements. It just, in substance, as
16 I understand it, says anything you find that the trade dress
17 contributed to you can award damages for, something to that
18 effect.

19 MR. CAHR: I guess we would, in light of what
20 they're going to be arguing on closing arguments, I guess
21 the problem is this: If we didn't know that they were going
22 to be arguing that they're entitled to convoyed sales on
23 things sold in connection with the trade dress, which do not
24 themselves contain the trade dress, then this probably would
25 be fine, but that is what they're going to argue for. And

1 so if you have this instruction, it doesn't address the
2 specific thing which is required under these circumstances.

3 THE COURT: Okay. Thank you.

4 And to plaintiffs on the California unfair
5 competition claim. Is it you that are bringing that claim
6 pursuant to the statute or are defendants right that is only
7 brought under common law?

8 MR. LINDVALL: Just one moment, Your Honor.

9 THE COURT: Sure.

10 (Counsel confer.)

11 MR. LINDVALL: Your Honor, we're bringing it
12 under common law, but we're saying under the code the
13 California Code, Section 343 gives you a four year statute
14 of limitations. So it's not --

15 THE COURT: So you're simply not asserting that
16 you have a statutory claim; correct?

17 MR. LINDVALL: That's correct. It's the common
18 law.

19 THE COURT: You agree with the defendants there
20 is a four year statute of limitations on the statutory claim?

21 MR. LINDVALL: Yes.

22 THE COURT: You agree with that. That is not
23 your argument. That is irrelevant, correct?

24 MR. LINDVALL: Yes. The last time, we realized
25 we don't really need to make that argument because if you

1 look at the California Code, Section 343, we should get a
2 four year limitation in any event.

3 THE COURT: All right. And so if we don't think
4 343 applies, then it's a two year statute of limitations;
5 correct.

6 MR. LINDVALL: I believe that is the default
7 under California law.

8 THE COURT: Okay. From defendants, why does 343
9 not apply?

10 MR. CAHR: Your Honor, based on the precedent we
11 cited in the letter, I think it's pretty clear that there
12 is two different kinds of unfair competition claims you can
13 make under these circumstances. You can make statutory ones
14 or ones that aren't. And if you are making statutory ones
15 under 17-200, then you get that whole panoply of very
16 specific rules that apply to that kind of unfair competition
17 claim.

18 If you are not, if you are making them under the
19 common law, courts have repeatedly said that this is what
20 applies.

21 THE COURT: Okay. Thank you.

22 Then to both sides, first with the plaintiffs,
23 we've been spending an awful lot of time on foreign
24 proceedings where we all know the laws are different, the
25 patents are different, trade dress infringement standards

1 I'm sure are different. I have suggested from time to
2 time maybe I should instruct the jury of this.

3 No one has proposed such an instruction. I have
4 not been able to restrain myself from drafting one which I
5 will happily share with you. But, conceptually, is there an
6 objection to me telling the jury, in substance: You have
7 heard about foreign proceedings between the parties. This
8 evidence was introduced largely for background between the
9 parties. It may also be relevant to induced infringement,
10 contributory infringement, willful infringement, but the
11 laws are different, patents are different -- something to
12 that effect.

13 The plaintiffs, would they object to me crafting
14 such an instruction?

15 MR. LINDVALL: No, Your Honor. I think that
16 would be fair.

17 THE COURT: All right. What do defendants
18 think?

19 MR. KELLEHER: I agree.

20 THE COURT: Then we'll put together a proposal
21 and we'll run it by you. And we will take a short recess.

22 (Brief recess taken.)

23 * * *

24 (Proceedings reconvened after recess.)

25 THE COURT: We're prepared to proceed?

Hage - designations

1 (The attorneys nod "yes.")

2 THE COURT: Okay. We'll bring the jury in.

3 (Jury returned.)

4 THE COURT: We're ready to go. Mr. Kelleher,
5 who is next?

6 MR. KELLEHER: Your Honor, we have an additional
7 deposition video to play. This is of a Mr. Dominique Hage,
8 who the jury met a few days okay.

9 THE COURT: Okay. Thank you.

10 Mr. Looby, will you turn the lights down.

11 (Deposition designations placed into the record.)

12 "The Videographer: And will the court reporter
13 please swear in the witness.

14 (Dominique Hage placed under oath.)

15 "Question: Can you please state your name for
16 the record?

17 "Answer: Dominique Hage on behalf of AHG/F2C2.

18 "Question: And you will be testifying on behalf
19 of both F2C2 and AHG in this deposition?

20 "Answer: Yes.

21 "Question: And so just to -- just to choose one
22 of these at random, what was the shape and size of the
23 cassette in 1994?

24 "Answer: Okay. I'll get to the point that --
25 I'll have to do a little bit of history then perhaps.

Hage - designations

1 "Question: Go ahead.

2 "Answer: 1994, Dassault had been involved
3 designing or industrializing the racks for us as a
4 partnership, Dassault Aerospace or Aircraft. Then the
5 cassettes have, had and always had, the shape, the form, the
6 dimensions, the look that they have nowadays in term of
7 volume, and in term of evolution in time they have acquired
8 their final look.

9 "The cassette is something that had to be
10 carried around, and it's kind of a wink to the period of
11 time where the system was thought and started to be
12 developed in the '80s. It's basically a briefcase.

13 "Question: So you wanted it to be a size that
14 you could carry it around?

15 "Answer: Yes. Absolutely. It's something
16 that had to look -- had its own identity in term of a
17 contraption that you could recognize and identify. Because
18 for years, since the first system has been sold and put
19 into production, all you were seeing was these boxes with a
20 handle, briefcases with handles that were either stacked
21 into the distribution unit or stacked into a buffer area.

22 "I don't know if you can call that our signature
23 or whatever, but F2C2 equipment, that's what it was looking
24 like.

25 "Question: And was there a particular reason

Hage - designations

1 why it was that particular size?

2 "Answer: Oh, there's always a reason for that.

3 I mean, you have -- you have a look, you have a size, you
4 have a shape. Then don't forget that the finality of this
5 equipment are to store and supply rivets to the machine.

6 "Question: Right.

7 "Answer: So the dimensions of being probably
8 and certainly designed to accommodate the coils inside and
9 so on.

10 "Question: Right. And the -- the chrome color
11 of the cassette, is that sort of the color of bare metal?

12 "Answer: That's aluminum.

13 "Question: And with aluminum, unless you
14 actively put a color on it, it is that particular color?

15 "Answer: Yes.

16 "Question: And so any -- anything made out of
17 aluminum would look like that unless you actively anodized
18 it, for example, or colored it in some way?

19 "Answer: That's a choice. That would be a
20 choice, yes.

21 "Question: And when did you -- when did you
22 learn that Broetje was making a competing cassette?

23 "Answer: Well, in Europe I think Phillippe had
24 the idea that there something wrong or fishy there in terms
25 of having a large order for a rack system, I think that was

Hage - designations

1 six or eight columns, but no order for cassettes.

2 "So that doesn't happen. This is a -- this is a
3 system as a whole. You can't have the racks without the
4 cassettes. It's totally useful. Or you can't have the
5 cassettes without the rack. It's the same thing. And if
6 you don't have a load station, you're going to spend a hell
7 of a long time filing the cassettes with rivets by hand,
8 which is not very productive.

9 So that dates back probably something like 2005
10 for what they discovered in Europe, but the -- but the
11 enduser was Vought Aircraft I believe in the U.S.

12 We discovered that there were some machineries,
13 rack cassette, and load station, at one of our customers in
14 Wichita, namely, Spirit Aerospace, when I sent one of my
15 engineers on an emergency intervention at this customer's
16 site in September 2007.

17 "Question: So do you believe that someone
18 seeing the Broetje cassette would be confused into believing
19 that it was the AHG cassette?

20 "Answer: Certainly.

21 "Question: And why?

22 "Answer: Because if you look, if you look at
23 them, put them on the table, if you don't read what's on the
24 label, you won't make a difference.

25 "Question: In the United States, have you --

Hage - designations

1 are you aware of any instance of confusion?

2 "Answer: In the U.S., not personally.

3 "Question: You say "not personally." Does that

4 --

5 "Answer: I have not witnessed it.

6 "Question: What?

7 "Answer: I have not witnessed it.

8 "Question: Have you heard of any?

9 "Answer: Not personally.

10 "Question: When you say "not personally," have
11 you heard somebody else recount that they have heard of it?

12 "Answer: No, what I'm leading to is, okay, I'm
13 selling machines, right?

14 "Question: Uh-huh.

15 "Answer: And I suppose Broetje Automation has
16 got a sales force, too. Broetje Automation machines are
17 being sold for the past -- not for the past ten years, but
18 for ten years, equipped with our system. And suddenly we
19 are in 2011, that was in 2005 or 2004, God knows when
20 exactly, so we're talking about six, seven years ago. They
21 keep marketing their machines, but with a product that they
22 are making themselves and which is a copy of ours, but
23 they're not telling their customers.

24 "Question: And do you believe that the
25 integrators and the endusers are sophisticated?

Hage - designations

1 "Answer: What do you mean by "sophisticated?"

2 "Question: Are they -- do they -- well, that's
3 actually a reasonable, a reasonable question. Do they --
4 are they conscious of who makes the products that they're
5 buying?

6 "Answer: Oh, certainly.

7 "Question: But when is the opportunity for
8 confusion to occur before the products are sold?

9 "Answer: Okay. I would say that a term of
10 sale when the -- the sale and technical team of Broetje
11 approaches a potential customer or a customer that has need
12 for their equipment, do they early, earlier on than when
13 they're started to be produced, do they advertise their
14 systems as being equipped with their own feed system or
15 don't they tell the customer that it is not -- it is not
16 F2C2 made or something like that.

17 "You know, the trend of the current affair of
18 business in this case were for ten years these machines come
19 equipped with F2C2 fastener feed system, and suddenly, from
20 one day to the other, this feed system is replaced by a feed
21 system looking very much alike but made by Broetje. I call
22 that confusion.

23 "Question: Do you have any evidence that
24 Broetje at any point told its customers that it was
25 continuing to sell F2C2 cassettes when it was no longer --

Hage - designations

1 "Answer: Fortunately, I'm not in the
2 negotiating room with them, so I can't tell you.

3 "Question: But do you have any evidence that
4 that took place?

5 "Answer: What do you call 'evidence?'

6 "Question: Do you have any support for the
7 statement?

8 "Answer: No. No.

9 "Question: I asked, I -- the specific question
10 I asked was: Do you believe that -- and I'll be more
11 defined -- do you believe that Broetje customers purchasing
12 Broetje cassettes from Broetje will be confused into
13 believing that those cassettes originated from F2C2 or AHG?

14 "Answer: Well, I'll give you a gut answer.

15 "When I do my job, just as you do yours, you can
16 run into some enraging or frustrating situation where you
17 will see a clone of your product being marketed and sold to
18 customers that could have been or should have been your
19 customers.

20 "I'm not trying to define the right or wrong in
21 the saying, but what I mean is, in my opinion, it is what
22 I'm going to call a precedence -- 'precedence' in French --
23 that's we were there before with this product in the shape
24 it has, and in the certain future you see the same product
25 coming from a company you had a business relationship with

Hage - designations

1 in term of distributing your product with their products and
2 one day they turn out just selling a copy of it. This is my
3 gut feeling.

4 "Question: Sorry about that. Can you identify
5 what this is?

6 "Answer: It's a cassette.

7 "Question: Who makes the cassette?

8 "Answer: We do.

9 "Question: And how can you tell?

10 "Answer: How can I tell? Well, a few things
11 would tell me it's one, but you have to look closely.

12 "Question: Does the large use of the logo on
13 the front assist?

14 "Answer: The way I'm holding it, I can't see
15 it.

16 "Question: Well, if you turn it towards you?

17 "Answer: Okay.

18 "Question: You can see that it says F2C2 System
19 AHG?

20 "Answer: It does, yes. Yes.

21 "Question: In very large lettering?

22 "Answer: Absolutely.

23 "Question: And then on the blue tape it also
24 says F2C2 System?

25 "Answer: It does, yes.

Hage - designations

1 "Question: And then in the corner it says F2C2
2 System as well?

3 "Answer: Tube Diameter 8. Yes.

4 "Question: And do you think that those would
5 indicate to a consumer that it was made by F2C2/AHG?

6 "Answer: I certainly think so.

7 "Question: All right. Well, can we grab
8 Exhibit 7 then?

9 "Answer: Pass me the other one. Yes.

10 "Question: Now, Exhibit 7 on the front says
11 Broetje Automation?

12 "Answer: Yes.

13 "Question: Do you think that -- did any of the
14 cassettes -- do any of the cassettes made by AHG say
15 'Broetje Automation' on the front?

16 "Answer: Certainly not.

17 "Question: And do you believe that the -- that
18 the fact that the name and logo are clearly displayed has
19 any impact on whether someone would be confused prior to
20 purchasing the product?

21 "Answer: I believe this is a clone.

22 "Question: What has been copied that is
23 protected -- let me rephrase that. What has been copied
24 that is proprietary to F2C2 and AHG?

25 "Answer: Okay. It might be silly of me to say

Hage - designations

1 it, but it's so obvious that I won't beat about the bush.
2 To point it, I mean, you take those two cassettes, put them
3 one on top of the other, wow, they're twin sisters,
4 absolutely. You put them side by side, you got exactly the
5 same opinion.

6 "Question: Now, you mentioned a couple of
7 minutes ago that if you were looking at these two items on
8 the shop floor, that you thought that they looked very
9 similar. Is that a correct characterization --

10 "Answer: Yes. Absolutely.

11 "Question: Would -- would a consumer ever see
12 these two products near each other before they purchased
13 them?

14 "Answer: No.

15 "Question: And the clear cover, does that serve
16 any purpose?

17 "Answer: Yes.

18 "Question: What does the clear cover serve?

19 "Answer: Well, number one, it enables you to
20 see whether there's some rivets in the tube. And that's the
21 same purpose with Broetje's cassette as with the AHG
22 cassette.

23 "That saves a manipulation. When you put it in
24 the rack, automatically, the system is going to come and
25 read the indications on the magnetic tags, and then you will

Hage - designations

1 know whether the cassette is full or not.

2 "But to save time, because there's usually a
3 fair distance between the buffer, the cassette buffer
4 storage and the machine, so it's very handy to be able to
5 look at it directly.

6 "Question: Yes, no, I understand.

7 "Now, the white connectors on the back?

8 "Answer: The what?

9 "Question: The white connectors?

10 "Answer: Yes.

11 "Question: Can you explain what those are for,
12 just so I can make sure for the record?

13 "Answer: Here, this is filling end of it.

14 "Question: Actually, you know what? Let's use
15 the AHG one. It probably is a little bit --

16 "Answer: That's the new one.

17 "Question: Yes.

18 "Answer: And it's fresh. Right.

19 "Question: Can you explain what the -- what
20 they're for?

21 "Answer: That's what I was doing. Here you
22 have the filling spout.

23 "Question: Okay.

24 "Answer: Through which rivets are fed into the
25 cassette.

Hage - designations

1 "Question: Okay.

2 "Answer: Then once you've filled the cassette,
3 you will close this filling port again.

4 "Question: Uh-huh.

5 "Answer: A, to prevent rivets from falling, and
6 B, to enable pressuring of the cassette coil, which is
7 acting as the force pushing the rivets through the
8 escapement into the end effector.

9 "Question: Now, is the shape of the connectors
10 important?

11 "Answer: They certainly are.

12 "Question: And why is the shape important?

13 "Answer: The shape is important because you
14 have a locking device that comes here or here (indicating)
15 that locks the cassette in place in the rack, and there's a
16 cassette presence switch that is actuated when you lock it.

17 "So the -- the linear axis support that carries
18 the Baluff head will come to read what's on the magazine tag
19 here to inform the system of what is now available, because
20 we have a new cassette on board.

21 "Question: Okay. So if the shape was
22 different, it wouldn't work with that?

23 "Answer: It would not.

24 "Question: Okay. And the -- I see that it's
25 colored white. Is that just sort of the plain plastic

Hage - designations

1 color?

2 "Answer: No, that's the -- that's the type of
3 material that has this color.

4 "Question: Okay. What type of material is it?

5 "Answer: Delrin or something or Nuance. I
6 can't remember the name of it.

7 "Question: But that's just the color of the
8 material?

9 "Answer: That's just a specific plastic, yes.

10 "Question: And if you could turn it around,
11 just the top one, it'll be a little easier to see where we
12 are.

13 "Answer: Like this?

14 "Question: Yes. Actually, all the way around.

15 "Answer: Like this?

16 "Question: Now, what is the purpose of the
17 handle?

18 "Answer: The handle is there to carry the
19 cassette.

20 "Question: Okay. And do you know if there was
21 an effort to try to have the cassette be a specific size so
22 that it would be easier to carry around or -- or was the
23 size chosen for any particular reason?

24 "Answer: There are quite a few reasons,
25 actually. I did talk about the shape previously. We wanted

Hage - designations

1 to have a form that was perfectly -- could perfectly be
2 identified. The handle has got a specific shape. It's a
3 nice feel so that people carrying it won't hurt themselves.

4 "Question: Do you -- does F2C2 make the handle
5 or do they purchase the handle?

6 "Answer: No, the handle is purchased. It's off
7 the shelf.

8 "Question: Other than the chrome color of the
9 cassette, the shape and size of the cassette, the shape,
10 size, color and placement of the handle, the placement, size
11 and shape of the white connectors, and the clear case cover,
12 are there any other -- are there any other elements of the
13 appearance of the cassette and which AHG and F2C2 claim is
14 trade dress?

15 "Answer: I would -- I would repeat what I said
16 before the break. Small briefcase. When I was younger,
17 back in the seventies, I remember there was a big thing
18 about the Halliburton briefcases.

19 "Question: Okay.

20 "Answer: If you remember.

21 "Question: I actually think I do.

22 "Answer: They were then in aluminum color.

23 After that, some years later, they produced them in various,
24 oxidized by color. You know how aluminum can be oxidized
25 with some pigment and you have black or whatever ?

Hage - designations

1 "Question: Has AHG or F2C2 ever advertised any
2 of those particular features and drawn attention to any of
3 those features in its advertising or marketing materials?

4 "Answer: No.

5 "Question: And how much money has AHG spent on
6 advertising its -- its cassettes?

7 "Answer: We don't advertise. We do
8 communication through some professional shows like the SAE
9 show or the Bourget in Paris. We talk to a very limited --
10 well, we address a very limited number of persons. This is
11 a very small world.

12 "Question: So is it a -- I don't know if you're
13 familiar with the word, but is it -- so is it a
14 specification process where you --

15 "Answer: Yes.

16 "Question: Okay. So, so you're not going to
17 them and saying, 'Here's our off-the-shelf products,' you're
18 working with them to come up with a solution for their
19 system?

20 "Answer: You said it exactly.

21 "Question: Which integrators does AHG sell its
22 cassettes with right now?

23 "Answer: Then in the U.S. you have Gemcor, Kuka
24 System, ElectroImpact. I'm forgetting some of them.

25 "Question: Now, do you sell the feeding systems

Hage - designations

1 to work with ElectroImpact machines?

2 "Answer: Yes.

3 "Question: And ElectroImpact also sells its own
4 feeding systems, too, right?

5 "Answer: Yes. Depending on the application,
6 they will choose to use our system or their system.

7 "Question: Do you know the reason why they
8 would choose yours or theirs in a given application?

9 "Answer: Feasibility.

10 "Question: Visibility?

11 "Answer: Feasibility.

12 "Question: Oh, feasibility. What about the
13 application of one is different than the other?

14 "Answer: Right. The scope, the scope that --
15 the scope of the fastener in our machines -- maybe that's
16 the wrong term. The population of fasteners in our machines
17 are capable of handling are --

18 "Question: Number of fasteners?

19 "Answer: -- pretty big, so if you have a pretty
20 small type of different fastener, you don't need to go for
21 the bug guns. Use a more rustic system.

22 "Question: Okay. And how is ElectroImpact's
23 system different from yours? Like their feed system?

24 "Answer: They don't -- they don't -- they don't
25 use a cassette feed system, ElectroImpact. They -- they

Hage - designations

1 did -- they prototyped one, but it never left prototype
2 stage.

3 "Mr. Cahr: I'd like to mark this as Exhibit 69.

4 "Question: Have you seen this document before?

5 "Answer: Yes, I know this document.

6 "Question: What is this document?

7 "Answer: Is it a letter or a fax? It's a fax
8 from Mr. Stehmeier or Holzer from Broetje who are stating a
9 few points after contacting me for some spares or Lord knows
10 what. I ended up telling him that we're not supplying you
11 anything because we've got a big problem with you, so forget
12 about any business relationship.

13 "Question: Okay.

14 "Answer: Present, future, or whatever,
15 basically.

16 "Question: And what -- what inspired this
17 reaction here? What made you -- what was the problem that
18 you had?

19 "Answer: This -- this occurred probably a few
20 weeks after I joined the company, so I asked how do I handle
21 this? Because I knew there was -- Broetje was a hard cookie
22 in terms of a relation, this company was not really what I'm
23 going to call a reliable business partner, and saying 'No
24 communication.'

25 "Question: Now, you, but you had -- by you,

Lawrence - direct

1 obviously, you joined in 2007, so by you, I mean AHG --

2 "Answer: Yes.

3 "Question: -- F2C2 had been aware of Broetje's
4 exit product for a couple of years?

5 "Answer: That's right.

6 "Question: What -- what happened in 2007 to
7 cause you to decide to cut off all business relationship?

8 "Answer: In my opinion, and that's only my
9 opinion, I believe that Philippe has tried to communicate
10 with Broetje during that period, stressing the fact that
11 their action was totally unfair, and if they were carrying
12 on, it was going to seek legal action."

13 (Designations end.)

14 MR. KELLEHER: Your Honor, as our next witness
15 we call Michael Lawrence.

16 THE COURT: Okay. We will turn the lights back
17 on then.

18 ... MICHAEL LAWRENCE, having been duly sworn as
19 a witness, was examined and testified as follows ...

20 THE COURT: Good morning. Welcome, Mr.
21 Lawrence.

22 Mr. Kelleher, you may proceed.

23 DIRECT EXAMINATION

24 BY MR. KELLEHER:

25 Q. Good morning, Mr. Lawrence.

Lawrence - direct

1 Could you please introduce yourself to the jury?

2 A. My name is Michael Lawrence.

3 Q. Where do you live?

4 A. In Madera, California.

5 Q. And where do you work?

6 A. At my own company, Lawrence Technical Services
7 Company.

8 Q. What is your company's business?

9 A. We provide technical services to the aerospace
10 industry, both military and commercial.

11 Q. Who are your clients?

12 A. Primarily the Boeing Company.

13 Q. What particular systems do you work on?

14 A. We work on automated fuselage assembly systems,
15 automated wing assembly systems, automated fastener feed
16 systems, machine vision systems. And many others.

17 Q. What particular fastener feed systems are you
18 familiar with?

19 A. I have worked with the Broetje fastener feed systems,
20 the F2C2 fastener feed systems, ElectroImpact feed systems,
21 and Gemcor feed systems.

22 Q. Do you primarily work at the Boeing Long Beach
23 facility?

24 A. Yes.

25 Q. Are there any other fastener feed systems currently

Lawrence - direct

1 in use at the Long Beach facility today?

2 A. Yes. We have an ElectroImpact fastener feed system,
3 which has been running there since 1998.

4 Q. Is that a cassette feed system?

5 A. Yes, it is.

6 Q. How did you gain your familiarity with fastener feed
7 systems?

8 A. I have been working with these systems for almost 20
9 years now. And we are required to maintain and repair these
10 systems.

11 Q. Could you tell us about your college education?

12 A. I graduated from New Hampshire Vocational/Technical
13 college with an associate's degree in mechanical engineering
14 in 1982.

15 Q. Could you tell us about your work history?

16 A. I began with the McDonnell Douglas Aircraft Company
17 in April of 1988 as a machine technician. And I worked
18 there through July of 1997.

19 Q. And where after McDonnell Douglas?

20 A. McDonnell Douglas Aircraft was acquired by the Boeing
21 Company. So that employment continued from July 1997
22 through September 2001 with the Boeing Company as a
23 maintenance technician, repairing the equipment, the
24 automated fuselage and assembly systems that were there.

25 Q. In 2001, what did you begin doing?

Lawrence - direct

1 A. At that point I formed my own company, Lawrence
2 Technical Services Company. And I have been doing that up
3 until this point. And over the last 12 years, I have been
4 continuously full time, I have been retained by the Boeing
5 Company to work on their systems.

6 MR. KELLEHER: Your Honor, I would tender Mr.
7 Lawrence as an expert in the field of fastener feeding
8 technology.

9 MR. LINDVALL: I will not object except as to
10 the extent we have a motion.

11 THE COURT: He is so recognized.

12 BY MR. KELLEHER:

13 Q. Mr. Lawrence, do you feel qualified to offer opinions
14 on the technology of fastener feed systems?

15 A. Very, very qualified. I spent many, many years
16 working on these systems and also the systems in question.
17 Other than the legal terms that are connected to this, I was
18 definitely not familiar with them when I first started with
19 this case.

20 Q. Have you ever served as an expert witness in
21 litigation before?

22 A. No, I have not.

23 Q. And have you ever testified as a witness in a trial
24 before?

25 A. No, I have not.

Lawrence - direct

1 Q. And are we compensating you for your time working
2 with us on this project?

3 A. Yes, you are.

4 Q. At what rate?

5 A. One hundred dollars per hour.

6 Q. What is your understanding of the idea of patent
7 infringement?

8 A. Well, to this we look to the claims of the patent.
9 Those are the numbered paragraphs at the end of the patent.
10 There is elements listed within these claims. And we
11 compare each one of these elements to the system in
12 question. And if all of the elements are contained in that
13 system, then the system infringes.

14 Q. When you look at those elements of the patent claims,
15 how do you interpret their meaning?

16 A. The Judge has ordered through construction of the
17 Court how to interpret the meaning of these elements.

18 Q. Have you formed any opinions about whether Broetje's
19 fastener cassettes infringe AHG's patents?

20 A. Yes, I have.

21 Q. What is that opinion?

22 A. In my opinion, the Broetje fastener cassettes do not
23 infringe the AHG patents.

24 Q. Why don't we look first at the '216 patent, Claim 1.
25 Could you please tell us why my client does not infringe

Lawrence - direct

1 this claim?

2 A. We see here, one of the elements is that the
3 cross-sectional area of the heads substantially equals the
4 cross-sectional area of the tube. And it is my opinion that
5 in the Broetje tubes, if we look at those, that the heads do
6 not substantially equal the cross-sectional area of the
7 tube.

8 Q. Have you done anything to help the jury understand
9 your opinion?

10 A. Yes. I provided a photograph.

11 Q. Is that on the right?

12 A. Yes.

13 Q. Could you please explain?

14 A. So when we look at this, we see the head of the
15 fastener is installed into the Broetje tube. And you can
16 see that there is space around the head of the fastener.
17 And it does not substantially equal the cross-sectional area
18 of the tube.

19 Q. Now, Dr. Kytomaa, the plaintiffs' expert, has told
20 the jury that he thinks Claim 1 is infringed. Can you tell
21 us why you disagree?

22 A. Well, if we look at Dr. Kytomaa's report, he has
23 provided us with a dashed line that is contained within a
24 pentagonal shape. And he states that this is the diameter
25 of the pieces.

Lawrence - direct

1 So when we look at that as a figure, yes, that
2 substantially equals -- this is what I would say is an
3 interpretation of substantially equals the cross-section of
4 what would be the hollow center of the tube. But yet when
5 we go back to the photograph, we can see that the head of
6 the rivet is much smaller than the cross-sectional diameter,
7 or cross-sectional area of the tube.

8 Q. Why don't we go to Claim 2 of the '216 patent. Could
9 you please tell the jury why you believe my client does not
10 infringe this claim?

11 A. Well, in this claim it says a dispensing apparatus as
12 in Claim 1, so that would be a dependent claim, so that
13 would mean that all of the elements of Claim 1 would have to
14 be true or present. So when you go back and look at Claim
15 1, we see that the heads of the fasteners are not
16 substantially equal. So that claim is also non-infringing.

17 Q. Okay. Why don't we now look at the '339 patent,
18 claim 1?

19 Could you please tell the jury why my client
20 does not infringe this claim?

21 A. Here, in claim 1 of the '339 patent, we see that the
22 pieces must have their axes of resolution extending along
23 the longitudinal axis of said tube.

24 So when we look here, I provided a few
25 photographs and we can see here that the axes of resolution

Lawrence - direct

1 of each of these fasteners is in a zig-zag pattern within
2 the tubes. So you can -- I have also provided some lines
3 there to show the axes of the rivet and how these crisscross
4 through the tubes.

5 Q. Was air pressure being applied when you took these
6 photographs?

7 A. Yes, air pressure is being applied to the Broetje
8 tubes.

9 Q. Why?

10 A. Because this is a method patent. And we can see
11 here, it says: Feeding one end of said tube with a
12 compressed fluid.

13 So you must do that in order to meet the
14 element. That is one element within the claim.

15 Q. Now, Dr. Kytomaa has told the jury that he thinks my
16 client infringes this claim 1. Can you tell us why you
17 disagree?

18 A. Well, when we look to his report, you can see here
19 this is just a piece of tubing, appears to be laying on a
20 tabletop. It's not part of the cassette coil, and it really
21 couldn't appear that compressed air has been applied to this
22 tube. And if you did apply the compressed air, the rivets,
23 you would see some zigzagging of these rivets as the heads
24 would meet one wall and the shanks of the fasteners would
25 meet the other wall.

Lawrence - direct

1 Q. So now we have claims 2 and 6 of the '339 patent.

2 Could you tell the jury why my client does not infringe

3 these claims?

4 A. Both of these are dependent claims. So when we look

5 at claims 2 and 6, we must also have all of the elements of

6 claim 1 as a process as in claim 1.

7 So we know that our fasteners, what we saw

8 from the previous photographs, that the fasteners' axial

9 alignment is not the same as the longitudinal axis of the

10 tube.

11 Q. Now, Mr. Lawrence, I'd like to switch over to a

12 different topic and talk about the prior art. Do you have

13 an understanding of what the term "prior art" means?

14 A. Prior art is technology that predates the patent.

15 Q. First I'd like to look at this, which is Exhibit 1173

16 in your book.

17 A. Okay.

18 MR. KELLEHER: I believe this is already in

19 evidence, Your Honor.

20 BY MR. KELLEHER:

21 Q. Mr. Lawrence, could you please tell us, what is this?

22 A. This is a coiled tube which has fasteners inside of it.

23 Q. Do we have a name for this?

24 A. It's the Shinjo/Komaki patent application.

25 Q. When is it from?

Lawrence - direct

1 A. 1981.

2 Q. Do you know which country it was filed in?

3 A. The U.K.

4 Q. Could you please tell us what Figure 1 shows?

5 A. Okay. And this is showing that it is a coiled tube
6 with fasteners installed inside.

7 Q. And what is shown in Figure 2?

8 A. This is a cross section of that tube. If we sit it
9 on its side and cut it, then we can see a cross section of
10 the tube with the rectangular tube, individual tubes with
11 the fasteners inside the tube.

12 Q. And what does Figure 3 show?

13 A. Figure 3 shows two of these coils installed on a
14 machine, and there has been through Figure -- or not Figure
15 17 but Part No. 17, compressed air has been applied to these
16 cassettes to feed the self-piercing nuts into the machine.

17 Q. So I've highlighted a portion of the text of the
18 Shinjo/Komaki application in the lower right-hand corner.
19 Could you please tell us what is the significance of this
20 language for the '339 patent, claim 1?

21 A. Well, I'm going to read that.

22 "The channels 2a are dimensioned so that there
23 is sufficient space for the compressed air to exert a force
24 on the individual nuts thereby ensuring a smooth movement
25 towards the" outer "end of the tube."

Lawrence - direct

1 Q. The other end?

2 A. Or "the other end of the tube."

3 Q. What is significant about that phrase for the '339
4 patent, claim 1?

5 A. Well, this is the basis of the AHG patent, and what
6 they're specifying or what is an element of claim 1 here.
7 So if we read that, it is we're distributing the fluid along
8 the length of the tube through at least one longitudinal
9 passageway on an internal surface of said tube and opening
10 into the hollow center thereof for exerting the pressure of
11 the fluid along the hollow center in the spaces between the
12 pieces, to the piece closest to the dispensing end.

13 Q. So looking at Figure 2 here, Mr. Lawrence, of the
14 Shinjo patent application. Does that have any relevance to
15 portions of claim 1 of the '339 patent you just read?

16 A. Well, we can see here that there are longitudinal
17 passageways at each corner of this rectangular tube and
18 these self-piercing nuts would not necessarily be exactly
19 aligned on the bottom of the tube, so there could be many
20 different, maybe an infinite number of passageways here and
21 different sizes and shapes going around each one of these
22 individual nuts.

23 Q. Is there any element of claim 1 of the '339 that is
24 missing from the Shinjo/Komaki reference?

25 A. We see the pieces, one after another, in the interior

Lawrence - direct

1 of the tube, which is true.

2 The next element, with their axes of revolution
3 extending along the longitudinal axis of said tube. That is
4 not true. Because we can see the way the fasteners are
5 installed in the tube, the fasteners are perpendicular to
6 the axis of the tube.

7 Q. Now, can I ask the elements you said are present?

8 A. Those other elements are present. Yes. The pieces
9 one after another in the tube, that element is present.

10 Q. So that and all other elements that you have said are
11 present?

12 A. And also, feeding one end of said tube, which we
13 already know which is part of the elements before, for
14 ensuring a transfer of pieces toward the open dispensing
15 end.

16 Q. So for those elements and the ones we spoke about
17 before, how convinced are you that those elements are
18 present in Komaki/Shinjo?

19 A. I am completely convinced those are present.

20 Q. Can you tell us why?

21 A. Because it is right there on the paper. It is what
22 it says.

23 Q. What would be different if instead of that
24 self-piercing nut in Shinjo/Komaki we used a rivet?

25 A. Well, if we're using a rivet, then we would have the

Lawrence - direct

1 longitudinal axis of the part in alignment -- or excuse me.
2 The axis of the rivet would then be in alignment with the
3 longitudinal axis of the tube.

4 Q. Would there be any elements missing of the claim
5 then?

6 A. Then there would be no elements missing from this
7 claim.

8 Q. Why would someone in the field of fastener feed
9 technology consider using rivets with Komaki?

10 A. I think it makes sense. The fact we have
11 longitudinal, obviously longitudinal passageways in this
12 tube to help assist in the guidance of the rivets down the
13 tube.

14 Q. Is Komaki/Shinjo limited to self-piercing nuts?

15 A. No, it is not. As you can see, "wherein component
16 parts," and this is mentioned in the patent that it is for
17 component parts, and rivets are component parts.

18 Q. So let's look at claim 2 of the '339 patent.
19 Assuming rivets were used with Shinjo/Komaki, are there
20 any elements of claim 2 of the '339 patent missing?

21 A. So here we add the plurality of linear grooves. And
22 as we discussed before in Figure 2, there is grooves or
23 passageways contained in those rectangular tubes. So all of
24 those would be met with rivets.

25 Q. Why don't I ask the same question about claim 6.

Lawrence - direct

1 A. In claim 6, we add the additional element of, with
2 stop members provided at the end of the tube.

3 So if we look to Figure 1, we can see that there
4 is elements acting as stop problems in the right angle
5 connector for the compressed air in figure 6, and then we
6 see a coupling down in Figure 7 that has a clasp on it that
7 can be used to contain fasteners into the tube. So those
8 would be stop members, so claim 6, the elements would be
9 present.

10 I think we already went through these slides.

11 Q. I think we did. Mr. Lawrence, could you please look
12 in your book to Exhibit No. 1175?

13 A. Okay.

14 Q. Can you tell us what this is?

15 A. This is a rivet ejector.

16 MR. KELLEHER: Your Honor, I would move into
17 evidence, Exhibit 1175. DTX.

18 MR. LINDVALL: No objection.

19 THE COURT: It's admitted.

20 (DTX-1175 is admitted into evidence.)

21 BY MR. KELLEHER:

22 Q. So, Mr. Lawrence, what is shown here in Figure 2?

23 A. Figure 2 is the actual ejector apparatus which would
24 be -- and we can see there are rivets aligned in a column
25 within this apparatus.

Lawrence - direct

1 Q. Okay. What is shown in Figure No. 8 here?

2 A. So here we have a riveter, the man that is pictured
3 there. He has a coil around his body filled with rivets.
4 And the ejector mechanism would be in his one hand, and then
5 we can also see that there is a small valve pictured in 47
6 to control the compressed air that would be flowing through
7 this tube to push the rivets through to the other -- to the
8 ejector mechanism.

9 Q. Mr. Lawrence, what is shown up here on Figure No. 6?

10 A. This is a component of the ejector mechanism which
11 would be stop members.

12 Q. And what is shown here in Figure No. 9?

13 A. This would be the valve that would be on the other
14 end which, if it was closed, would be a stop member. It
15 would keep the fasteners from coming out of that tube.

16 Q. So why don't we look at claim 1 of the '339 patent,
17 Mr. Lawrence.

18 Could you tell us what is the significance of
19 the Offutt patent for this portion of claim 1?

20 A. So we can see here, it's a relatively long tube. The
21 free end which is mounted, rivet ejecting head. There is a
22 coiled portion around his body, mounted, mounted about his
23 body. And it is possible to provide space for a very large
24 number of rivets.

25 So when we look to the patent there, we see this

Lawrence - direct

1 is a process for dispensing identical pieces, rivets, having
2 a symmetry of revolution about an axis which we explained
3 before. And providing a tube, having a hollow center and
4 a shape corresponding to the transverse section of the
5 greatest diameter of the pieces; that would be peripheral
6 guidance. And we also have compressed fluid in the coiled
7 tube.

8 Q. Are you able to find those elements in the Offutt
9 present?

10 A. Yes, they are all present.

11 Q. What about this section of the text I have
12 highlighted here? What is the significance for claim 1 of
13 the '339?

14 A. So here we see that the air will pass down through
15 the tube and into the horizontal bore, part of it passing
16 out around the rivets.

17 Q. What is the significance for claim 1 of that
18 language?

19 A. So then when we look down to claim 1 here, that there
20 is a longitudinal passageway opening into a hollow center,
21 with spaces between the pieces.

22 So when we look at that, we can see that air is
23 passing completely through this tube and out the end of the
24 ejector mechanism. So there are passageways. These are not
25 pistons installed in the tube, these are rivets, and there

Lawrence - direct

1 is passageways around the rivets, around the heads and the
2 shapes of the rivets down to the ejection mechanism.

3 Q. Mr. Lawrence, have you identified any elements of
4 claim 1 that are missing from the Offutt patent?

5 A. No, I haven't.

6 Q. Let's look at claim 2. Have you identified any
7 elements of claim 2 of the '339 that are missing from the
8 Offutt patent?

9 A. Here we see that the plurality of linear grooves,
10 which under the Court's construction are the same as
11 passageway. We already identified there are passageways in
12 and around the rivet heads and shanks all the way around
13 and air is passing through this tube, and so we do have a
14 plurality of linear grooves.

15 Q. Mr. Lawrence, I have claim 6 up on the screen here.
16 Are there any elements of claim 6 missing from the Offutt
17 patent?

18 A. No, there are not. So here we have a mention of stop
19 members. As we can see from the patent themselves, and
20 they're both highlighted here in this photo, that they're
21 stop members on the ejector mechanism, and we also have a
22 valve that could be closed and act as stop member on that
23 end to keep the rivets from coming out of the tube.

24 Q. Why don't we look at the '216 patent now,
25 Mr. Lawrence, claim No. 1.

Lawrence - direct

1 Are there any elements of claim No. 1 missing
2 from the Offutt patent?

3 A. No, there are not. We can see it is a relatively
4 long tube, and a tube have a hollow center aligned, said
5 pieces aligned one after another. So we can see that in the
6 figures. Open to a hollow center. That the rivets are
7 arranged in a column. And that we could also see that the
8 transverse cross-section of the heads correspond. And you
9 can see they're fitting into the tube so that the heads
10 correspond to the cross-section of the tube. And we
11 could also see here that it also substantially equals the
12 diameter of the tube. It is not a tight fit but it does
13 substantially equal. There is some room around the heads
14 but it was substantially equal.

15 Q. Then looking at claim 2 of the '216 patent. Is there
16 any element of claim 2 missing from the Offutt patent?

17 A. Again, here we talk about the plurality of said
18 grooves. And as I mentioned before, air will pass down
19 through the tube into the horizontal bore, passing around
20 the fastener heads and shanks and through to the ejector
21 mechanism.

22 Q. Thank you. Could you look in your book to DTX-1183?

23 A. Yes.

24 Q. Could you please tell us what this is?

25 A. This is a stud feeding mechanism.

Lawrence - direct

1 Q. Is this a U.S. patent?

2 A. Yes, it is.

3 Q. And who is the inventor?

4 A. Mr. Brosene.

5 MR. KELLEHER: We'll have it up on the screen in
6 just a second.

7 Your Honor, I will move into evidence DTX-1183.

8 MR. LINDVALL: No objection.

9 THE COURT: It's admitted.

10 (DTX-1183 is admitted into evidence.)

11 BY MR. KELLEHER:

12 Q. Mr. Lawrence, could you please tell us, looking to
13 page 5 of the patent, and then looking at Figure No. 14,
14 what exactly is it that is shown here in Figure No. 14?

15 A. So this appears to be a cassette with a coiled tube
16 installed where studs are installed into these coiled tubes.

17 Q. Looking above that, that is Figure No. 13, what is
18 shown in Figure No. 13?

19 A. So we see here that the cassette has been installed
20 on a pole. There is a supply of compressed air coming in,
21 No. 42 there, the supply of compressed air comes into the
22 cassette and out the other end of the cassette that the
23 studs are fed down through the tube into the stud-feeding
24 mechanism.

25 Q. And in what year was Brosene's patent filed with the

Lawrence - cross

1 Patent Office?

2 A. This was filed in 1968.

3 Q. Thank you. Was it initialed 1968?

4 A. Yes.

5 Q. Thank you, Mr. Lawrence. I don't have any more
6 questions.

7 THE COURT: Okay. Cross-examination.

8 CROSS-EXAMINATION

9 BY MR. LINDVALL:

10 Q. Good morning, Mr. Lawrence.

11 A. Good morning.

12 Q. Good afternoon, sorry.

13 I have a couple questions to ask you.

14 A. Okay.

15 Q. Let's go back a little bit through your background.

16 You don't have a Bachelor's degree in
17 engineering, do you?

18 A. No, I do not.

19 Q. And you don't have a Master's degree in engineering?

20 A. No, I do not.

21 Q. You don't have a Ph.D. like Dr. Kytomaa in
22 engineering?

23 A. No, I do not.

24 Q. You have never been a professor at any university?

25 A. I have not been a professor at a university, no.

Lawrence - cross

1 Q. And you have never designed any type of automated
2 rivet feeding system which uses tubes to deliver rivets.

3 Correct?

4 A. No, I have not.

5 Q. And, in fact, you have never designed a cassette such
6 as the AHG cassette. Correct?

7 A. No, I have not.

8 Q. Now, your primary job at your company is the
9 maintenance and repair of automated rivet feeding systems.
10 Correct?

11 A. It is one of the jobs we do, yes.

12 Q. And in 2011 your company had two employees, which
13 included yourself. Correct?

14 A. Yes.

15 Q. And you are not the named inventor on any U.S.
16 patents. Correct?

17 A. No.

18 Q. Now, I am going to digress from your opinions you had
19 today. What I am going to do is focus you on your job and
20 your experience you had with AHG cassettes. I believe you
21 testified earlier you work in a Boeing facility. Correct?

22 A. Yes, I do.

23 Q. And in that Boeing facility at least one of the
24 Broetje machines uses AHG cassettes. Correct?

25 A. We use AHG cassettes, yes.

Lawrence - cross

1 Q. That Boeing facility is at Long Beach, California.

2 Correct?

3 A. Yes.

4 Q. And you still work there?

5 A. Yes, I do.

6 Q. Now, at the Long Beach facility at Boeing where you
7 work, there are three Broetje riveting machines. Correct?

8 A. Yes, there are.

9 Q. And at least as of June 2011, back when I took your
10 deposition, two of the Broetje rivet machines used the AHG
11 automated rivet feeding systems. Correct?

12 A. Yes, they did at that time.

13 Q. And these two Broetje rivet machines were installed
14 in the 1998-1999 time frame. Correct?

15 A. Yes, they were.

16 Q. And so these two Broetje rivet machines had been used
17 in the AHG automated riveting feeding system for about 11 to
18 12 years, at least as of the point of your deposition in
19 2011. Correct?

20 A. That's correct.

21 Q. Now, with respect to the two AHG automated rivet
22 feeding systems, there are about a total of 80 cassettes
23 used between these two systems, correct, as of 2011?

24 A. Yes, that's correct.

25 Q. And these 80 cassettes were delivered by AHG to

Lawrence - cross

1 Boeing about 11 to 12 years ago. That was as of 2011.

2 Correct?

3 A. Yes, that's correct.

4 Q. And Boeing performed extensive testing on AHG's
5 automated rivet feeding systems, which includes the
6 cassettes, before it purchased the AHG rivet feeding system.

7 Correct?

8 A. That's correct.

9 Q. And after Boeing conducted extensive testing on AHG's
10 automated rivet feeding system, it accepted AHG's feeding
11 system for use on the Broetje rivet machines. Correct?

12 A. Yes, it did.

13 Q. Now, to the best of your knowledge, at least as of
14 June 2011, with respect to those 80 cassettes, the AHG 80
15 cassettes that had been operating for 11 to 12 years as of
16 2011, there had been only one technical issue with them.

17 Correct?

18 A. No, that's not true.

19 Q. Could you please play Clip L-19, please?

20 "Question: Do you know approximately how many
21 AHG cassettes that are at the Long Beach facility? Number.

22 "Answer: I believe there are 80 cassettes.

23 "Question: Okay. And of these 80 -- these 80
24 cassettes were delivered approximately 11 to 12 years ago,
25 best of your knowledge?

Lawrence - cross

1 "Answer: Yes.

2 "Question: Okay. So these 80 AHG cassettes
3 were ones that were designed back in the late 1990s, to the
4 best of your knowledge?

5 "Answer: Yes, they are that vintage.

6 "Question: And so, to the best of your
7 knowledge, with respect to at least 70 out of the 80 AHG
8 cassettes in the last 11 to 12 years, there's only been one
9 issue, hardware issue, relating to those cassettes and
10 that's with the micro-actuator. Correct?

11 "Answer: Yes."

12 THE COURT: Please state for the record the page
13 numbers.

14 MR. LINDVALL: Sure. Just a moment, Your Honor.

15 It would be Page 58, Line 19 through Page 59,
16 Line 6, and Page 60, Line 5 to Page 60, Line 10. And then
17 Page 60, Line 13 to 60, Line 13.

18 BY MR. LINDVALL:

19 Q. Now, you prepared two expert reports in this case.
20 Correct?

21 A. Yes, I did.

22 Q. And these expert reports are what contain all the
23 opinions that you have given to the jury today. Correct?

24 A. Yes.

25 Q. Now, attached to your expert report was a chart which

Lawrence - cross

1 you used to support your claim that AHG's patents were
2 invalid. Correct?

3 A. That's true.

4 Q. And these are some of the opinions you gave today.
5 Correct?

6 A. Yes.

7 Q. And the charts supporting your opinions on patent
8 invalidity were prepared by Broetje's lawyers. Correct?

9 A. Along with myself, yes. I sat with the Broetje
10 lawyers and we prepared this information.

11 Q. So the lawyers, when you initially got these charts
12 which showed your analysis, your opinions, that was
13 originally given to you by Broetje's lawyers. Correct?

14 A. The initial charts were given to me. So they had
15 initial charts and patent research that was done. So we
16 went through the prior art, you know, examined the prior
17 art.

18 Q. Now, in forming your opinions, you understand you
19 were supposed to presume that the patents were valid.
20 Correct?

21 A. Yes.

22 Q. And what is that presumption based on, do you know?

23 A. I think this has to do with the burden of proof.
24 Like I said, these legal terms, I mean, I am definitely not
25 familiar with all of them.

Lawrence - cross

1 Q. You understand the presumption is based on the fact
2 that the U.S. Patent Office, who has examined the patents,
3 the AHG patents, and has issued them, that they get a
4 presumption that they acted properly and correct. Right?

5 A. Yes.

6 Q. And you understand as a result of that the burden of
7 proof for Broetje to prove the patents are invalid is clear
8 and convincing evidence. Correct?

9 A. Yes.

10 Q. Which is higher than to show infringement. Correct?

11 A. Yes.

12 Q. Now, in addition to your report on invalidity of the
13 AHG patents, you have a report which attempts to rebut Dr.
14 Kytomaa's opinions that the Broetje cassettes infringe the
15 patents. Correct?

16 A. Yes.

17 Q. And you based your opinions that the Broetje
18 cassettes do not infringe the AHG patents by examining a
19 Broetje cassette. Correct?

20 A. Yes, I did examine a Broetje cassette.

21 Q. In fact, you showed some photographs to the jury.
22 Correct?

23 A. Yes.

24 Q. And that was based on a cassette that you had.
25 Correct?

Lawrence - cross

1 A. Yes.

2 Q. In fact, your expert report has these same
3 photographs you have up on the slides. Correct?

4 A. That is correct.

5 Q. But the cassette that you used was provided to you by
6 Broetje's attorneys. Correct?

7 A. That's correct.

8 Q. And the cassette had been loaded with rivets when you
9 received it. Correct?

10 A. That's correct.

11 Q. And it was Broetje's attorneys who decided what
12 rivets were loaded in the cassette. Correct?

13 A. It was actually, I think, two different -- I believe
14 there was two different types of fasteners depicted in the
15 images. So it would have been with two different types of
16 rivets, or two different lengths of rivets.

17 Q. I would like to play Page 137, Line 18, to Page 137,
18 Line 25, L.

19 "Question: Okay. Now, when you received the
20 cassette from the attorneys for Broetje, did you specify
21 what type of rivets that you wanted?

22 "Answer: No.

23 "Question: They gave it to you filled with
24 rivets, though?

25 "Answer: Yes. Yeah, with these -- with the

Lawrence - cross

1 fasteners that you see in Figure 1 and 2A."

2 Now, these four photos you showed the jury today
3 for your noninfringement opinion, these photos were taken at
4 your home. Correct?

5 A. That's correct.

6 Q. These weren't taken at a factory?

7 A. No, they were not.

8 Q. So the Broetje cassette was delivered to you, you had
9 it at home, and you took photographs of the cassette at
10 home?

11 A. Yes.

12 Q. And you didn't have it hooked up to a rack. Correct?

13 A. No. But I have a device --

14 Q. Listen to my question, please. You didn't have it
15 hooked up to a rack. Correct?

16 A. No, I did not.

17 Q. So you had no way of having the separator hooked up
18 to a rack so that each of the rivets would slowly separate
19 in that fashion. Correct?

20 A. No, I did not.

21 Q. And when you took these photos of the rivets that you
22 showed to the jury, they weren't moving. Correct?

23 A. No, they were not.

24 Q. Now, in actual operation, if they were hooked up to a
25 rack, and you were in the plant, like at Gemcor, like Dr.

Lawrence - cross

1 Kytomaa did, as the rivets are ejected into the Broetje
2 rivet machine, there is movement of the rivets through the
3 tube. Correct?

4 A. Yes, there is.

5 Q. You don't have any videos of that, do you?

6 A. No, I do not.

7 Q. But when you took your photos, you did not attempt to
8 look at the orientation of the rivets as they moved through
9 the tube. Correct?

10 A. Well, I was not able to eject the rivets, so I
11 couldn't take multiple photos of that.

12 Q. So you observed them, you observed the rivets only in
13 a stationary or static position. Correct?

14 A. Yes.

15 Q. Now, you just had some testimony about this patent
16 called Shinjo, which the jury has heard quite a bit about
17 today, both from Dr. Budach yesterday and today and
18 yourself. Correct?

19 And I believe that Dr. Budach had characterized
20 Shinjo as the closest prior art to the AHG patents. Is that
21 correct?

22 A. I did not hear Dr. Budach's testimony.

23 Q. You didn't sit through Dr. Budach's testimony?

24 A. No.

25 Q. Now, in forming your opinions, your validity

Lawrence - cross

1 opinions, relating to whether the AHG patents are valid or
2 not, you considered this Court's definitions of the various
3 terms in the patent claims. Correct?

4 A. Yes, I did.

5 Q. In forming your opinions relating to the validity of
6 the AHG patents, you used the Court's definitions of the
7 patent claim terms groove and passageway. Correct?

8 A. Yes, I did.

9 Q. Now, let me show you what has been marked as
10 DTX-1031.

11 Now, this is the prior art that you rely on to
12 show that the AHG patents are invalid. Correct?

13 A. Yes.

14 Q. And you understand that all the claims of the AHG
15 patents contain as a required element grooves or
16 passageways. Correct?

17 A. One more time?

18 Q. Let me rephrase. Probably wasn't very well asked.

19 You understand the AHG patents, each one of the
20 claims require, to show it's invalid, that you have to show
21 that there is a groove in Shinjo. Correct?

22 A. A groove or a passageway.

23 Q. Yes. And you understand groove and passageway have
24 been defined by the Court as meaning the same thing.

25 Correct?

Lawrence - cross

1 A. Yes.

2 Q. So when I use passageway or groove, just for the
3 jury's edification, they mean the same thing. Correct?

4 A. Yes.

5 Q. So to show that Shinjo is an invalidating piece of
6 prior art, you have to show that Shinjo discloses a groove.
7 Correct?

8 A. Or a passageway, yes. Because they are the same.

9 Q. They are the same. If I just say groove, that would
10 be fine with you?

11 A. Say groove.

12 Q. Groove has been used throughout the whole
13 proceedings?

14 A. Yes.

15 Q. So the jury doesn't get confused, okay.

16 Now, you agree with me that Shinjo does not
17 disclose grooves as required by the AHG patent claims.
18 Correct?

19 A. It discloses passageways and thereby grooves.

20 MR. LINDVALL: Could you please play L-05.

21 "Question: Now, let me show you what I've
22 marked as Exhibit 55, which is a Patent Application GB
23 2,067,149.

24 "It's the Shinjo patent.

25 "Are you familiar with this?

Lawrence - cross

1 "Answer: Yes.

2 "Question: And this is on Page 48 of Exhibit 2
3 to your expert rebuttal report.

4 "And the shape of the tube in the Shinjo patent
5 application is rectangular. Correct?

6 "Answer: That is correct.

7 "Question: Okay. And does it show any grooves,
8 though?

9 "Answer: No."

10 Now, you also agree that the Shinjo patent
11 application also does not disclose a required element of the
12 claims of the '339 patent that have, with axis of revolution
13 extending along the longitudinal axis of said tube.
14 Correct?

15 A. That is correct.

16 Q. So that is two elements that we have seen.

17 You agree that all elements of the '216 patent
18 expressly require the use of rivets. Correct?

19 A. One more time with that one?

20 Q. You will agree with me that all of the claims of the
21 '216 patent expressly require the use of rivets. Correct?

22 A. All of the elements?

23 Q. Well, let's say this, the claims of the '216 patent
24 expressly require the use of rivets. Correct? Do you
25 understand my question?

Lawrence - cross

1 A. No, I don't understand your question.

2 Q. Let me try to be a little more clear. I am sorry if
3 I am not.

4 The claims of the '216 patent, one of the
5 elements, it must be a rivet that is being used in the
6 claim. Do you agree with that?

7 A. Yes.

8 Q. And you agree that Shinjo does not expressly disclose
9 the term rivet in it. Correct?

10 A. It doesn't expressly disclose rivet, but component
11 parts.

12 Q. Now, if I could show you PTX-124, please. I believe
13 that one of the things that you considered in forming your
14 opinions is what we call the patent file history. Have you
15 ever seen this document?

16 A. This is fuzzy.

17 Q. Can you blow it up a little bit for the witness so he
18 can see it.

19 Let me give you the exhibit books.

20 THE COURT: Do you have a hard copy, Mr.
21 Lawrence?

22 THE WITNESS: I can't see that at all.

23 MR. LINDVALL: May I approach, Your Honor?

24 THE COURT: You can.

25 BY MR. LINDVALL:

Lawrence - cross

1 Q. So now you have a paper copy in front of you. I
2 apologize for not having given that to you earlier.

3 A. We are looking at what?

4 Q. PTX-124. Do you see that?

5 A. Yes, I do.

6 Q. Have you ever seen this?

7 A. I do not recall seeing this document.

8 Q. Look at the top right-hand corner, do you see this?
9 That's the patent number for the '216 patent. Correct?

10 A. Yes.

11 Q. So in forming your opinions you don't recall ever
12 considering the patent file history of the '216 patent?

13 A. At least I did not see this particular form. I mean,
14 I certainly considered the patent and the elements in the
15 patents. But I do not recall seeing this particular form.

16 Q. Okay. Do you recall whether you were even provided
17 the patent file histories of the AHG patents?

18 A. I am not exactly sure what that term means. So it
19 would be hard -- the patent file history? I don't know if
20 this would be supporting documentation to the patent. Is
21 that what --

22 Q. Let me explain to you what a patent file history is.
23 A patent file history is a record of the back-and-forth
24 between the applicant -- first the applicant files a patent
25 application. And then the U.S. patent examiner, who is

Lawrence - cross

1 trained in this area, examines the application for a number
2 of different things, including whether the claims should be
3 allowed over the prior art. And the applicant and the
4 examiner may go back and forth until the examiner either
5 says the patent can issue or the patent is not going to
6 issue because I believe the claims are not sufficiently
7 novel.

8 Have you heard that before?

9 A. I believe there is a record of this, maybe as part of
10 the patent. But I have never seen any of the supporting
11 documentation.

12 Q. Well, this is the record. This is the official
13 record from the Patent Office.

14 A. Okay. No, I have never seen this.

15 Q. Okay. Well, let any just show you real quickly.
16 Look down at the bottom, these right here. This box here.

17 A. Okay.

18 Q. And you see that when the '216 patent was being
19 examined by the Patent Office, there is an Examiner
20 Patterson. Do you see that?

21 A. Yes.

22 Q. And there is a Supervisory Patent Examiner,
23 Mr. Sewell. Do you see that?

24 A. Yes.

25 Q. These are Examiners who actually examined the

Lawrence - cross

1 application which ended up issuing as the '216 patent.

2 A. Okay.

3 Q. You got that?

4 A. (Nodding yes.)

5 Q. Now, do you understand these two Examiners,
6 particularly Mr. Patterson, specifically considered the
7 Shinjo reference before they issued the patents?

8 A. Well, I'm sure they've got to take that into account
9 when they examined it.

10 Q. But since you have never seen this document, you
11 don't realize that the Examiners actually specifically
12 looked at Shinjo before they allowed these claims to be
13 issued; correct?

14 A. Correct.

15 Q. Now, let's look at, for example, page 49 of this
16 exhibit, Exhibit P-124.

17 Okay. Right here. What I'm showing you here,
18 this is Mr. Bornes' patent attorney who sent correspondence
19 to the United States Patent Office, trying to get the patent
20 issued. And this is the correspondence to the Patent
21 Office.

22 Right here, Mr. Bornes patent attorney is
23 actually giving a copy. He doesn't have an obligation to
24 do that but he is actually giving a copy of Shinjo for the
25 Examiner's consideration. So he actually, not only did the

Lawrence - cross

1 Examiner not find this but they actually gave a copy of
2 Shinjo to the Patent Office for their consideration.

3 Do you see that?

4 A. Yes, I believe this is regularly done when prior art
5 is included.

6 Q. Yes. Usually the Examiner finds it, but actually
7 it's quite unusual, do you understand that, for the
8 applicant to find something and give it to them. This
9 was also mentioned in the specification to Shinjo?

10 A. Yes.

11 Q. Okay. So let's turn to page 51. Again, this is the
12 file history. This is something we ordered from the Patent
13 Office. So if you were to order it, this is what you would
14 get, and you can see what is right in the file history. And
15 this is the copy of Shinjo that we gave, that Mr. Bornes'
16 attorneys gave the United States Patent Examiners so they
17 can consider Shinjo to see whether or not the patents should
18 be valid or not, or should be issued.

19 Do you understand that?

20 A. Yes.

21 THE COURT: Mr. Lindvall, how much more do you
22 think you have with this witness?

23 MR. LINDVALL: Maybe another 10 or 15 minutes.

24 THE COURT: Well, we'll give the jury their
25 lunch break then, and we'll come back and finish up.

Lawrence - cross

1 Lunch is here. No talking about the case during
2 the break. We'll gets you back in a little while.

3 (Jury left courtroom.)

4 THE COURT: All right. We're going to be in
5 recess. Before you step out, I have three copies for each
6 side of our proposed instruction on foreign law. Take a
7 look at that, and before we come back with the jury after
8 lunch, I'll see if both sides have any view as to our
9 proposed instruction. But we will be in recess.

10 (Lunch recess taken.)

11 * * *

12 Afternoon session - 1:10 p.m.

13 THE COURT: Is there anything we should discuss
14 before we bring the jury in?

15 MS. SHARP: Your Honor, we reached agreement on
16 the disputes that relate to Langenfeld except for one scope
17 dispute. They proposed to introduce testimony that relates
18 to apportionment that is not mentioned anywhere.

19 THE COURT: I'm sorry. This is an objection
20 that is beyond the scope?

21 MS. SHARP: Yes.

22 THE COURT: Okay. Mr. Cahr.

23 MR. CAHR: Your Honor, that is not the argument
24 that is being made. It was an argument made in his reports
25 and that I discussed with Mr. Ellis that selling --

Lawrence - cross

1 THE COURT: Let me ask you this: Is there any
2 reason for me to rule on this?

3 MR. CAHR: No.

4 THE COURT: All right. Ms. Sharp, is there any
5 reason for me to depart from the Farnan rule as we have been
6 calling it?

7 MS. SHARP: I think what is different here is
8 slides exhibited the intent in advance so we know it is
9 coming, but if Your Honor desires the Farnan rule and we
10 proceed that way we understand.

11 THE COURT: Then the objection as beyond the
12 scope of the expert report is noted and we'll deal with it
13 consistent with all the others.

14 MS. SHARP: There is one more brief question.
15 As Your Honor can imagine, everyone is counting time. We're
16 unclear whether the sidebars are counted against us.

17 THE COURT: The sidebars, the ones that came up
18 during your cross, are counted against you. You are partly
19 getting some of that time back, probably more than that
20 given my ruling, but that factored into my ruling.

21 MS. SHARP: Understood, Your Honor.

22 THE COURT: Is there anything else?

23 MR. LINDVALL: No, Your Honor.

24 THE COURT: All right. We'll bring the jury
25 back in.

Lawrence - cross

1 (Jury returned.)

2 THE COURT: Welcome back. I hope you enjoyed
3 lunch. We are ready to proceed.

4 Mr. Lindvall, you may proceed.

5 MR. LINDVALL: Thank you, Your Honor.

6 Back to PTX-124.

7 BY MR. LINDVALL:

8 Q. Now, remember, this is from the United States
9 patent file history. We established that; correct?

10 A. Yes.

11 Q. And you understand this is actually the official
12 record from the Patent Office that shows what we call the
13 prosecution history that led to the issuance of the '216
14 patent; correct?

15 A. Yes.

16 Q. And as I explained to you before, the Shinjo patent
17 or patent application was actually given to the Examiner
18 so the Examiner considered it before he or she actually
19 issued the patents or decided whether they're valid or not;
20 correct?

21 A. Yes.

22 Q. Okay. Now, let's look at page 85, please.

23 Do you see here what finally came of that?

24 After consideration of the Shinjo patent, the United States
25 patent was finally issued, the '216 patent, and it was

Lawrence - cross

1 issued over the Shinjo patent.

2 If you could bring up JTX-1, please. And if you
3 could zero right in here (indicating).

4 Do you see this? And you understand that the
5 1307052 is the Shinjo patent?

6 A. Yes.

7 Q. Okay. And this shows you that the Examiner
8 considered this right on the face of the patent; correct?

9 A. Yes.

10 Q. And if you look -- take this down, this part down,
11 please.

12 And the Examiners, the Examiners that we just
13 saw right here, the Primary Examiner and Assistant Examiner.
14 And both allowed the patent over the Shinjo reference. Do
15 you see that?

16 A. Yes, I do.

17 Q. Let's go to PTX-125, please.

18 Now, you probably don't recognize this because
19 you didn't recognize the file history of the '216, but this
20 is the file history for the '339 patent. Do you see up
21 here? And this comes from the United States Patent and
22 Trademark Office.

23 And if we go down from this, the front page, we
24 have here, again, we have a different Examiner examining the
25 '339 patent. A -- I don't know of if it is a Ms. Or Mr. --

Lawrence - cross

1 Palomar. Then we have a different Supervisor Patent
2 Examiner.

3 So now we have a different Examiner examining
4 the '339 patent. Do you see that?

5 A. Yes, I do.

6 Q. So let's go to JTX-2, please.

7 And right here, the United Kingdom. Do you see
8 this reference on the front face of the '339 patent is the
9 Shinjo reference. Correct?

10 A. Yes.

11 Q. Okay. And you see the Examiners who examined the
12 '339 patent are different Examiners than examined the '216
13 patent; correct?

14 A. Yes.

15 Q. Essentially we have four different Examiners who have
16 all considered the Shinjo patent and allowed the '339 and
17 '216 patent to issue; correct?

18 A. That's correct.

19 Q. And these are Examiners of the United States Patent
20 and Trademark Office who are trained in patent law and may
21 be trained in the technical area who examine these patents.
22 You understand that; correct?

23 A. Yes.

24 Q. Now, there some other kind of art, some other art
25 that you discussed with the jury that you said invalidates

Lawrence - cross

1 the patent. We're going to briefly go over a couple of
2 those. One was the Offutt patent and the Engeln patent;
3 right? I may not be pronouncing that right.

4 A. Engeln.

5 Q. Do you know the Offutt, O-f-f-u-t-t, patent?

6 A. Yes, that patent I am aware of.

7 Q. And that is one of them you gave testimony about today?

8 A. Yes.

9 Q. And the other was the Engeln, E-n-g-e-l-n?

10 A. Yes, Engeln. There was no testimony on that patent.

11 Q. Okay. No testimony on that.

12 Now, the Offutt patent doesn't have any grooves
13 as required by all the claims of the '216 and '339 patent;
14 correct?

15 A. But there are passageways which equals grooves as we
16 have discussed going by the heads, as the air flows past
17 the heads of the fasteners and shanks of the fasteners.

18 Q. If we could play page 150 of your deposition, line 3
19 through page 150, line 10. It's L44.

20 "Question: If you -- let's go back to
21 Exhibit 52, the Engeln or prior art, E-n-g-e-l-n. It's
22 Exhibit 52.

23 "In the same way that the Offutt patent has a --
24 kind of a perfectly effectually shaped circle tube shown, it
25 doesn't have any grooves, also; correct?

Lawrence - cross

1 "Answer: They're not represented, so I would
2 assume they're not there, yes."

3 Q. Thank you. Now, you also gave testimony about the
4 Bronson patent; correct?

5 A. Brosene.

6 Q. Brosene. I told you I'm -- the Brosene patent;
7 correct?

8 A. Yes.

9 Q. And it's your opinion the Brosene patent claims have
10 all the elements of the claim of the patent, the '216 and
11 the '339 patent; correct?

12 MR. KELLEHER: Objection, Your Honor. Beyond
13 the scope.

14 THE COURT: Beyond the scope of the direct?

15 Mr. Lindvall.

16 BY MR. LINDVALL:

17 Q. Did you use the Brosene patent --

18 MR. LINDVALL: Withdraw the question, Your
19 Honor.

20 THE COURT: We will withdraw the question.

21 BY MR. LINDVALL:

22 Q. Did you use the Brosene patent during your testimony
23 today?

24 A. Brosene, yes.

25 Q. Yes. And did you give an opinion that the Brosene

Lawrence - cross

1 patent contained grooves?

2 A. That there are passageways within the tube that
3 are --

4 MR. KELLEHER: Objection again, Your Honor.
5 Beyond the scope.

6 THE COURT: Mr. Lindvall.

7 MR. LINDVALL: Your Honor, I think the testimony
8 is clear that he just said that he gave testimony about
9 Brosene, and I asked him whether or not Brosene has grooves.
10 I don't think there's -- I think it is an improper objection.

11 THE COURT: Mr. Kelleher.

12 MR. KELLEHER: He did not give testimony
13 concerning whether there were grooves or passageways in
14 Brosene.

15 THE COURT: Did he give testimony about Brosene
16 and whether it invalidates it?

17 MR. KELLEHER: He did not.

18 THE COURT: He did not.

19 Mr. Lindvall.

20 MR. LINDVALL: Under that condition that Brosene
21 does not invalidate any of the claims of the patent, I don't
22 have any ...

23 THE COURT: He is not expressing an opinion that
24 Brosene invalidates?

25 MR. KELLEHER: He is not today.

Lawrence - redirect

1 THE COURT: And he is not in this trial?

2 MR. KELLEHER: That's correct, Your Honor.

3 THE COURT: Okay. Then I will sustain the
4 objection.

5 MR. LINDVALL: Thank you. Just to make sure
6 I'm clear, because we had six references. You are using
7 Shinjo --

8 THE COURT: Mr. Lindvall, if you want a chance
9 to talk to Mr. Kelleher, you may do so.

10 (Counsel confer.)

11 MR. LINDVALL: Thank you.

12 Okay. I don't have any further questions under
13 that condition. Thank you, Mr. Lawrence.

14 THE COURT: All right. Redirect.

15 REDIRECT EXAMINATION

16 BY MR. KELLEHER:

17 Q. Mr. Lawrence, when you expressed an opinion that
18 there were passageways in Shinjo and Offutt, what definition
19 did you use?

20 A. This is under -- I used the Court's construction for
21 those.

22 Q. Do you remember offhand what that is?

23 A. That grooves equals passageways.

24 Q. And for passageways, could you turn to PTX-103 in
25 your book? The small one.

Lawrence - redirect

1 A. Which one?

2 Q. 103. On the second page, paragraph D. Does that
3 refresh your memory as to the definition of longitudinal
4 passageway?

5 A. Longitudinal passageway.

6 Q. So what was the definition that you used for
7 passageway in Shinjo and Offutt?

8 A. A passageway which can be of any hollow shape
9 regardless of the cross-section -- the cross-sectional of
10 the tube extending in the direction of the length of the
11 tube.

12 Q. Under that definition, you found there were
13 passageways?

14 A. Yes.

15 Q. And looking at paragraph G, what is the definition of
16 grooves in this case?

17 A. The term "grooves or groove" means "passageways."

18 MR. KELLEHER: No further questions, Your Honor.

19 THE COURT: Thank you, Mr. Lawrence. You may
20 step down.

21 MR. KELLEHER: Next, Your Honor, we're going to
22 play another video. This time it is Mr. Bornes.

23 THE COURT: Mr. Bornes. And about how long do
24 you think?

25 MR. KELLEHER: Six minutes.

Bornes - designations

1 THE COURT: Six minutes. Turn down the lights,
2 please.

3 (Deposition designations placed into evidence.)

4 (Witness Phillippe Bornes placed under oath.)

5 "Question: Could you please state your name for
6 the record?

7 "Answer: My name is Phillippe Bornes.

8 "Question: So, if we used a tube that has an
9 internal shape like an oval that where the sides are smaller
10 than the rivet head so the rivet head cannot get in there,
11 would those be grooves?

12 "Answer: What we call groove is what is defined
13 in this patent. It's not a test that I run, so I really
14 can't answer that question.

15 "Question: So you don't -- you don't have any
16 ovals in the patent, right?

17 "Answer: There's no oval in the patent, but
18 what is for sure is that in the patent we have coiled tubes,
19 and I can guarantee you that the coiled tube is oval inside,
20 is an oval inside, and that's all I can say about this.

21 "Question: Why would it be an oval if it is
22 coiled?

23 "Answer: Because when you fold the tube, the
24 segment is not round any longer. It's a matter of physics.

25 "Question: The circular portion of the tube is

Bornes - designations

1 deformed by bending; then it becomes an oval?

2 "Answer: Yes.

3 "Question: Now I would show you Exhibit No. 54.

4 This is also a United States patent, this one to a gentleman
5 named Brosene, and it is entitled Study Feeding Mechanism?

6 "Answer: I don't know. I don't know this word.

7 "Question: So would you look to Figure No. 14.

8 "Yes, that is the page. So does this show a
9 cassette filled with a coiled tube filled with fasteners?

10 "Answer: It's the box with a coil in it, and I
11 suppose it is filled with rivets. I don't know.

12 "Question: How would your invention be
13 different from that?

14 "Answer: I don't know the geometry of this tube
15 so I can't compare.

16 "Question: Well, I see it's coiled, so that
17 means that the inner shape would be an oval?

18 "Answer: Yes.

19 "Question: If you were going to sell what is
20 shown in Figure 14, would you leave the ends of the tube
21 open as they are shown?

22 "Answer: Actually, I can't tell you if I would
23 be able to sell this unit because I can't tell if the rivets
24 would move smoothly through this unit.

25 "If it was my tube, I would put something at the

Bornes - designations

1 end, yes, because if it was my tube and if it was a
2 cassette, I would have to use it as a transfer unit between
3 the feeding machine and the rack and I need to be sure that
4 no foreign element would get mixed into it during the
5 storage process.

6 "Question: And so is the principle of
7 peripheral guiding shown in Figure No. 2?

8 "Answer: Peripheral guiding is only to show
9 that an object is going to move through the matter. So the
10 spaces that are indicated here cannot necessarily be an
11 indication of anything. In the patent, in fact, there's no
12 indication of the minimum or maximum amounts of space and so
13 on and so forth.

14 "Question: Right. Right. And that's -- so let
15 me ask the question this way: In Figure No. 2, there's a
16 very little amount of space in between the rivet head and
17 the internal wall. If I were to start making that space
18 bigger, is there a point where we no longer would have
19 peripheral guiding of the column of rivets?

20 "Answer: You still have guiding as long as the
21 rivet is not able to flip on itself inside a tube or be at
22 an angle that would be sufficient to create jamming inside
23 the tube.

24 "Question: So I believe you said that in the
25 year 2005 you discovered a cassette with a Broetje brand

Bornes - designations

1 name on it at Airbus in Bremen?

2 "Answer: Yes.

3 "Question: After you learned that, what did you
4 do?

5 "Answer: I mentioned it to Jean-Marc Auriol.

6 "Question: Then there came a point where it was
7 discovered that Broetje cassettes were also in France?

8 "Answer: Yes.

9 "Question: When was that?

10 "Answer: I think it was in 2006.

11 "Question: So, by that point, you knew that
12 Broetje was selling their cassettes in multiple countries?

13 "Answer: Yes. Let me be more detailed or let
14 me elaborate here. I knew that they had delivered cassettes
15 at that time, but I didn't know if they had been sold or if
16 they had been simply given in order to do some testing.

17 "Question: Did you have any reason to believe
18 that they had not also been delivered to the United States?

19 "Answer: I can't say. Unless I know if it
20 really happened, I don't know if it really happened.

21 "Question: Did Broetje do anything to lead you
22 to believe that the cassettes had not been delivered to the
23 United States?

24 "Answer: I could have some doubts about that,
25 but I could not have any certainty.

Bornes - designations

1 "Question: What kind of doubts?

2 "Answer: Since they had done that in Europe,
3 one could infer that they could have done that in the United
4 States, but that's all I could -- that's it. That's all I
5 could think, and I had no data to prove that it had been
6 done."

7 MR. CAHR: The defense calls Dr. James
8 Langenfeld.

9 ... JAMES LANGENFELD, having been duly sworn as
10 at witness, was examined and testified as follows ...

11 THE COURT: Good afternoon. Welcome, Dr.
12 Langenfeld.

13 Mr. Cahr, you may approach.

14 MR. CAHR: Thank you, Your Honor.

15 If I could give an introductory statement?

16 THE COURT: That is fine.

17 MR. CAHR: Our next witness is James Langenfeld.

18 Dr. Langenfeld is an economist who specializes in the
19 calculation of damages in matters just like this. He is
20 the managing director of Navigant Economics. Dr. Langenfeld
21 is not here to offer any opinions about liability, about
22 whether there is infringement or not. He is not a legal
23 or technical expert. He is simply here to offer his opinion
24 on the amount of damages Broetje should pay if AHG should
25 win.

Langenfeld - direct

1 DIRECT EXAMINATION

2 BY MR. CAHR:

3 Q. Good afternoon, Dr. Langenfeld.

4 A. Good afternoon.

5 Q. By whom are you employed?

6 A. Two places. Navigant Economics and Loyola University
7 in Chicago.

8 Q. And what is Navigant Economics?

9 A. Navigant Economics is a consulting firm that does a
10 variety of things. Partially this type of work, also
11 working for the government agencies on a variety of economic
12 topics.

13 Q. What is your position at Navigant Economics?

14 A. I am a managing director.

15 Q. What do you do as a managing director?

16 A. Well, for one thing, I work on projects like this
17 quite regularly. But most of the time I spend is on
18 analyzing competition in a variety of markets and what the
19 implications of, for example, a change in the market would
20 be.

21 Q. And, Dr. Langenfeld, you also work as a professor?

22 A. Yes. I teach at Loyola University. I am the token
23 economist at Loyola University Law School. I teach law and
24 economics there, which includes actually teaching the proper
25 way to do damages in a case like this.

Langenfeld - direct

1 Q. Can you please list your degrees for us?

2 A. I have a Bachelor's degree from Georgetown University
3 in Washington, D.C. I have a Ph.D. from Washington
4 University in St. Louis.

5 Q. Dr. Langenfeld, can you tell us about your employment
6 history?

7 A. Yes. I worked for a number of years for the Federal
8 Trade Commission. That's a government regulatory body. I
9 supervised actually 45 Ph.D. economists, so each one had
10 their own ideas, obviously.

11 I then worked as a consultant. I worked at
12 General Motors as an in-house senior economist for a few
13 years, too.

14 That is sort of the general sweep.

15 Q. Do you belong to any professional organizations?

16 A. Yes. The American Economic Association, a variety of
17 other associations, including the litigation section of the
18 American Bar Association.

19 Q. And what type of publications have you made in your
20 professional life?

21 A. I have over a hundred publications. A large chunk of
22 those deal with the appropriate way to calculate damages in
23 intellectual property cases, unfair competition cases, and
24 the like.

25 Q. Have you worked on matters related to the aerospace

Langenfeld - direct

1 industry, in particular?

2 A. Yes. It goes back a ways. But since the late 1980s
3 I have worked in the aerospace industry probably on about
4 two dozen different matters on different aspects of
5 aerospace.

6 Q. And have you testified at trial in intellectual
7 property cases or damages cases in the past?

8 A. I have been involved in a great number of them. I
9 actually testified in trial probably a dozen or so times.

10 Q. Have you worked for both plaintiffs and defendants in
11 these cases?

12 A. Yes, I have.

13 Q. Dr. Langenfeld, what was the assignment for you in
14 this case?

15 A. Well, the assignment was to look at the asserted
16 claims here, which were patent infringement and the other
17 claim, shall we say, and to estimate what damages might be
18 based on normal economic criteria and analysis, and then
19 specifically to look at what Mr. Ellis has done to see
20 whether that is reliable, and follow the appropriate
21 evidentiary and analytical standards.

22 Q. And can you please tell us a little bit about the
23 work you performed to complete this assignment?

24 A. It was an extensive assignment. I had people work
25 with me. We reviewed over 13,000 pages of transcript and

Langenfeld - direct

1 documents and financials and things like that. Financials
2 are actually larger than that. These are records from both
3 Broetje and AHG. We looked at that. We analyzed, I and my
4 staff, looked at the reliability of those documents and data
5 to see whether they were solid.

6 Q. Did you talk to anyone?

7 A. Yes. I talked to several people at Broetje, Ken
8 Benczkowski, he testified earlier, and Axel Peters, and
9 others at Broetje.

10 Q. Did you perform any independent research?

11 A. Yes. There is literature, I guess, for everything.
12 There is literature about this. It is published in journals
13 and such. So I carefully reviewed that, to see what the
14 outside parties, not just the parties involved, what was
15 said about competition, what was important to me.

16 Q. Did you visit anyplace?

17 A. Yes, I visited two facilities. I visited the
18 Gulfstream facility in Savannah and the facility where
19 Boeing makes 787s in Charleston, South Carolina.

20 Q. Did you learn about the patents in the case?

21 A. Yes, understood as much as, not being a technical
22 person, but assuming that there are damages or could be
23 damages from the infringement and from the other acts, I did
24 look at those.

25 Q. Did you prepare any expert reports or analyses?

Langenfeld - direct

1 A. Yes. I actually prepared several reports over time,
2 as new information came up. And that was evidentiary, a lot
3 of spreadsheets, a lot of computations and a lot of review
4 of materials.

5 Q. And did you have a team assisting you?

6 A. Yes. I had several people helping me.

7 Q. Why do you perform all of these analyses as part of
8 your work?

9 A. Well, to do this type of work, you have to be very,
10 very, very careful. You have to consider the other side is
11 going to get everything that you do, and there is a
12 professional standard that you have to follow. To do that,
13 to achieve that, you really have to make every effort to be
14 a hundred percent, you have to make every effort to do the
15 most careful job.

16 Q. Like all the experts in this case, I am assuming you
17 are not doing this for free. What does Navigant charge for
18 you and your team?

19 A. Navigant charges \$725 an hour for my time. It
20 charges for this case, the people that worked on it, between
21 about \$100 an hour to about 425 was the top, other than me.

22 Q. Does your income or Navigant's income depend on the
23 outcome of this trial?

24 A. No.

25 Q. I would like to offer Dr. James Langenfeld as an

Langenfeld - direct

1 expert on damages.

2 MS. SHARP: Your Honor, if it is the practice in
3 this district to always offer -- I neglected to offer Mr.
4 Ellis. I assume that is not a problem.

5 THE COURT: Not a problem. And you have no
6 objection?

7 MS. SHARP: Subject to what was earlier
8 reserved, nothing.

9 THE COURT: Fine. He is so recognized.

10 BY MR. CAHR:

11 Q. Dr. Langenfeld, have you reached opinions in this
12 matter?

13 A. I have.

14 Q. Did you issue reports that reflect those opinions?

15 A. I did.

16 Q. Were those opinions accompanied by attachments that
17 summarize your findings?

18 A. Yes.

19 Q. Can you please turn in your witness binder to
20 DTX-1945?

21 A. I have turned to that page.

22 Q. Do you recognize this document?

23 A. Yes. The first part of it appears to be my vitae, my
24 resume, my experience, basically. And then the rest of it
25 seems to be some of the documents that I considered in my

Langenfeld - direct

1 expert report, additionally. Then a number of tables that I
2 used that showed my calculations for damages.

3 Q. These are the tables that were provided with your
4 most recent report?

5 A. Yes, they are, it appears to be complete.

6 MR. CAHR: Your Honor, pursuant to our agreement
7 with opposing counsel, I would ask that DTX-1945 be entered
8 into evidence.

9 MS. SHARP: No objection.

10 THE COURT: It is admitted.

11 (Exhibit DTX-1945 received in evidence.)

12 BY MR. CAHR:

13 Q. Can you please publish the first page.

14 If I could flip through a few pages so the jury
15 can see the type of tables and calculations that were
16 performed here, which were obviously very similar types of
17 calculations?

18 A. You are going through a bunch of my publications
19 here. So you should skip forward.

20 That is some of the documents that I and my
21 staff reviewed.

22 Q. These reflect the calculations that you made in order
23 to come to your conclusions. Is that correct?

24 A. That is correct.

25 Q. If we can go back to the slides, tell us a little bit

Langenfeld - direct

1 about the conclusions that you reached after performing
2 these various analyses?

3 A. Okay. I think it's helpful to think about this as
4 sort of splitting the analysis at least in two parts. One
5 part is the patent damages part. And the other part is what
6 they call copying, I think is what has been accused here,
7 which summarizes several other claims.

8 So the first thing that I did -- well, one of
9 the things I do and I will discuss first, at least, is to
10 look at the patent damages aspect, to focus on that, because
11 that is what Mr. Ellis did initially in his report.

12 And although you can use reasonable royalty
13 rates or lost profits, he chose to use lost profits under
14 what is called the Panduit criteria. That's what he called
15 it. It's named after a court case.

16 Q. What are some of the things that you discovered that
17 he failed to do?

18 A. Well, let me first make a point. Mr. Ellis said that
19 he analyzed things under the Panduit criteria. And I want
20 to say that I completely agree with him, that that was the
21 right thing to do, because the Panduit criteria are a series
22 of economic tests to see whether you can get reliable
23 estimates of damages. So he and I are in complete agreement
24 that that is the right approach.

25 The problem I have, and it's very brief, and

Langenfeld - direct

1 there is a lot of work very briefly summarized on this
2 slide, is that there are various steps, and I do not
3 believe, based on my experience and my analysis, that he did
4 an adequate job in, frankly, any one of these.

5 Q. And so can you just describe some of these things
6 that you failed to do?

7 A. Well, as he discussed, first of all, you are supposed
8 to show the patented feature, not a cassette but the
9 patented features are demanded. And people are willing to
10 pay extra for them. And that but for, in this case but for
11 Broetje, if Broetje had not attempted to sell the cassettes
12 or the tubes at issue here, those cassettes, that no one
13 would have bought them. That's really what he is saying.
14 That that is the key element. Those patents drive that
15 demand.

16 Q. And can you explain the second point that you make
17 here about noninfringing substitutes?

18 A. Can I just finish?

19 Q. Oh. My apologies, Mr. Langenfeld. I didn't realize
20 you weren't finished.

21 A. There are lots of things that drive demand here. It's
22 not just the patents, it's other aspects of reliability.
23 It's other aspects of the cost. It's a variety of things.
24 It's not, in my opinion from what I have seen in the record,
25 not just those patented features. The shape of the tube

Langenfeld - direct

1 basically. And he attempts to show that there is demand.

2 And what he does, he shows the dollars figures or the
3 purchases of cassettes that Broetje or AHG sold F2C2 sold.

4 Q. And you don't believe that is adequate?

5 A. It's meaningless. What that shows is that the
6 cassettes, somebody wanted to buy the cassettes. It doesn't
7 show that anybody wanted to buy the cassettes just because
8 of the patented feature. It's a complete non-analysis. And
9 you really shouldn't. It's just not right.

10 (Brushing against microphone.) Oops. Sorry. I
11 get excited. I'm an economist. I get excited about things
12 like this and I hit the microphone. I'm sorry. We can move
13 on now.

14 Q. No, that's okay, Dr. Langenfeld. Can you explain
15 your second point about noninfringing substitutes?

16 A. Well, the second point, the second element of the
17 Panduit analysis is are there noninfringing substitutes?

18 So the question is the ultimate customer, the
19 people who want to buy and sell all this stuff, do they have
20 alternatives to purchasing a system that doesn't contain the
21 patented feature, the tubes with the appropriate shape?

22 And the answer is yes, they do. In fact, we
23 see people go out and buy them. We see they're not exactly
24 the same. They're not perfect substitutes, don't get me
25 wrong, but there are other cassettes. There are some other

Langenfeld - direct

1 vibratory bowls and hoppers. I have seen them in facilities.
2 And at least during a part of the damage period here,
3 because remember the patent period was from 2000-2009,
4 during that period, at least some time, ElectroImpact was
5 selling cassettes that weren't accused of infringing. So
6 those are those other choices out there.

7 And the question is -- and this is important.
8 The question is if it turned out that Broetje was not
9 selling its products with the patented feature, what would
10 customers buy? And what Mr. Ellis has assumed, and not
11 analyzed in my opinion, is that every single one of those
12 sales that Broetje made, AHG and F2C2 would have made not a
13 single one of those.

14 Q. And this is what is known as but-for causation; is
15 that correct?

16 A. Right. Because we are trying to go back and
17 economists are not good for predicting the future but we're
18 pretty good for predicting the past.

19 So you go back into the past and you say let's
20 pretend, let's assume Broetje had not produced these units.
21 What would the world have looked like? Would all of the
22 sales that Broetje made for all of those systems, 100
23 percent, gone to AHG/F2C2? And the answer is there is
24 nothing that shows that in the record. In fact, it would be
25 shocking if that were true. Now, maybe they would have made

Langenfeld - direct

1 a lot of them. I'm not saying that. But the assumption for
2 the damages that Mr. Ellis is using, that's his assumption.

3 Q. And so the next part of the Panduit test is the
4 marketing and production limitations. Can you describe that
5 for us, please?

6 A. This one actually goes to what would have happened
7 in the but-for world again. If AHG and F2C2 could not have
8 quickly, I mean quickly, ramped up and manufactured all the
9 units that Broetje sold during the damage period -- which
10 is before, which is the before 2009; right? -- then they
11 couldn't have made all those sales. They just didn't have
12 the capability. And it was a small operation and during
13 that period of time they didn't ramp up.

14 Now, eventually, afterwards, afterwards, they
15 did eventually ramp up, but during that period of time there
16 is no evidence they could have easily. In fact, it's not
17 just whether they could have made it but whether they could
18 have sold it, and the record I show is that AHG only had one
19 person responsible for selling these products in the United
20 States. One.

21 So you are not, they would have to expand to
22 make that work. And during the period of time, at least
23 during the patent violation period, there is really no
24 evidence they could have done it. And it could have
25 expanded but not -- I mean it's a 45 percent increase in

Langenfeld - direct

1 their sales they would have had to make to cover all of
2 the Broetje units during that period.

3 Q. And the last Panduit factor is reliably quantifying
4 lost profits. Can you describe that as well?

5 A. Yes. Basically, you have to be able to calculate the
6 numbers right and make sure that the assumptions you are
7 making in calculating the numbers are verified around it.

8 Part of the problem with this is he did a couple
9 of things, Mr. Ellis did a couple of things that I think are
10 incorrect. One is that he excluded some costs and, in
11 particular, he excluded some royalty costs which typically
12 appear in the books and they would typically be left in as a
13 cost.

14 Because, remember, he is calculating out lost
15 profits which is the sales that AHG would have made at AHG
16 prices minus AHG cost. That is the profit. That is the
17 lost profit times the number of, appropriate, I would say,
18 number of units that it would have picked up had Broetje not
19 been in the market. That's the story.

20 And with these costs, he is eliminating costs,
21 he is adding profits. And, in my opinion, that is what he
22 has done. He excludes about \$2.8 million in royalty costs
23 that are technically paid to people who are not plaintiffs
24 in this case as I understand.

25 Secondly, he over-counts the number of Broetje

Langenfeld - direct

1 sales units and in a big way I think over-counts the number
2 of units as a general matter. Units that don't even include
3 the alleged infringing tubes.

4 Q. And just so that the jury can understand, can a
5 plaintiff show one of these or two of these or three of
6 these and obtain lost profits damages?

7 A. Well, I'm not -- you're the jury, and the Judge will
8 instruct you I'm sure. As an economist, I have to tell you
9 that for me, to be able to end up accurately estimating lost
10 profits, you have to have each one of these steps checked
11 off. You can't check off two or three and say I got them.
12 Because each one of these is integral into having a reliable
13 damages calculation, a lost profits damage calculation.
14 It's a chain here. To pull a good estimate of lost profits
15 through, each one of the links has to be strong.

16 Q. And can you describe some of the other errors that
17 you were able to uncover in looking at the calculations of
18 Mr. Ellis?

19 A. Well, these relate both to -- well, for the lost
20 profits, these -- the first one of these, that I already
21 mentioned he assumes that F2C2 would have sold every Broetje
22 cassette and accused tube, and also every loading station
23 and rack that Broetje sold. And these are a big problem
24 because they greatly affect not only his patent damages but
25 his other damages, too. This affects all the damages that

Langenfeld - direct

1 he does. The patents plus the others for lost profits.

2 Q. What are some of the other issues you have identified?

3 A. For unjust enrichment. And this is an important
4 concept, unjust enrichment. Unjust enrichment is, okay, I
5 made profits. You may have lost but I'm the bad guy. I
6 made profits off of you. It's not that I made revenue off
7 of you, because as a bad guy, just like in lost profits for
8 a damage to AHG, you have to play the game the same on both
9 sides. You have to give revenue and you have to subtract
10 out incremental costs, and those incremental costs are what
11 I have been unjustly enriched by and I'm going to give those
12 over to the other side.

13 He doesn't subtract out costs.

14 Q. Is that unreasonable to do?

15 A. It's economically -- I'll say it's economically
16 inappropriate. Let's put it that way. It's playing the
17 game, you know, it's through the heads I win/tails you lose.
18 We'll do one analysis on one side one way but we're just
19 going to completely ignore costs on the other.

20 Q. So costs should have been deducted?

21 A. Absolutely. And that obviously makes a huge
22 difference in unjust enrichment damages, the fact he ignores
23 costs.

24 Q. And your final point, does this relate to something
25 called convoyed sales?

Langenfeld - direct

1 A. Yes, this certainly relates to convoyed sales. There
2 are a huge chunk. 80 percent of his damages, sliced another
3 way, are due not to the sales actually of cassettes which
4 have the tubes in them. So if we make the assumption that
5 the tubes entirely drive the demand for cassettes. Let's
6 make that assumption. Economists make these assumptions,
7 simplifying assumptions.

8 He calculate damages based on that. But, he on
9 top of that, calculates damages based on loaders and on
10 racks, and those loader and rack damages are 80 percent of
11 the damages that he calculates, and the tubes aren't even in
12 those products.

13 Yeah, here. This gives you an example.

14 Basically, it's one of those things where he is
15 balancing all of his damages on the point of the two patents.

16 Yes, this one I like. And maybe this couldn't
17 speak to you. I like triangles, one way or the other.

18 Q. Yes. So explain what the cassettes are at the bottom
19 and the distribution racks are at the top?

20 A. Yes. If you look at this, the cassettes are at the
21 bottom and the patented item, the tube, the shaped tube is
22 actually inside the cassettes. Now, you think, well, that
23 is what I would think. That is, well, that is where most
24 of the damages would be.

25 Well, that is just not true. 20 percent of his

Langenfeld - direct

1 damages are in the cassettes and the other 80 percent are in
2 distribution racks and loading stations. So he is balancing
3 all of these sales on the shape of the tube. 100 percent.
4 That is what he is assuming.

5 Q. Unfortunately because it's a timed trial we're
6 going to get the hook here momentarily, but I would like to
7 make sure that we address a couple of slides, the primary
8 conclusions that you were able to reach after performing
9 your analysis.

10 So what was the first type of calculation you
11 did, and then what was the second type of calculation that
12 you did?

13 A. Well, yes. The first type of calculation I did after
14 dealing with these things and appropriately dealing with the
15 cost issues and all of that for unjust enrichment is to make
16 assumptions that I don't think are supported by the facts
17 but are in favor of the claim.

18 So, first of all, I'm going to say that the
19 Panduit discussion that I had about the limitations there
20 and that the chain was broken in several places, I'm going
21 to pretend the chain is glued back together. I'm just going
22 to pretend that analysis doesn't really apply.

23 And I'm going to assume for purposes of this
24 that that inverted triangle, I'm going to assume that they
25 all go together. The sides, the shape of the tubes drives

Langenfeld - direct

1 all those sales.

2 Q. So in this analysis, you are presuming Mr. Ellis's
3 assumptions are correct?

4 A. Not all of them but most of them. He actually counts
5 wrong in the number of units and some other things, but,
6 yes, mostly this follows what he does.

7 Q. And what was your conclusion in this analysis for
8 patent infringement?

9 A. For patent infringement, as it says here, it's about
10 \$1 and-a-half, a little over \$1 and-a-half million for the
11 patent infringement period.

12 Q. And for the other claims?

13 A. Well for the lost profits, it's about \$2.5 million,
14 let's say. That is about right, for the other claims.

15 And for the unjust enrichment, it's about
16 \$1.9 million. And that subtracts out costs. I subtract out
17 costs in the unjust enrichment one.

18 Q. And, Dr. Langenfeld, just to be clear, do you believe
19 these numbers are correct?

20 A. No, I think he has overstated the damages here.

21 Q. And what do you believe the damages would be, taking
22 into account proper economic analysis here?

23 A. Well, I'll still make the assumption that the chain
24 is not broken for Panduit or the other items.

25 Q. So just to interrupt. Do you believe that there

Langenfeld - cross

1 should be no damages awarded here?

2 A. Well, I think that absent showing the length --

3 MS. SHARP: Objection, Your Honor. His personal
4 belief is irrelevant.

5 MR. LINDVALL: That's true. That's true.

6 BY THE WITNESS:

7 A. My analysis -- I shouldn't say belief, you are right.
8 My analysis tells me that there is inadequate evidence to
9 show any damages here.

10 Q. But if there were damages, what would your
11 conclusions be?

12 A. My conclusions would be that lost profits based on
13 cassette sales, assuming the shape of the tube drives the
14 cassettes, would be about \$233,000. And for the other
15 claims for lost profits, about \$454,000. And for unjust
16 enrichment, about \$509,000.

17 Q. And you believe Mr. Ellis's damages numbers are
18 overstated?

19 A. Yes, they're highly overstated.

20 MR. CAHR: Thank you. No further questions,
21 Your Honor.

22 THE COURT: Okay. Cross-examination.

23 CROSS-EXAMINATION

24 BY MS. SHARP:

25 Q. Good afternoon --

Langenfeld - cross

1 A. Good afternoon.

2 Q. -- Dr. Langenfeld. We have not had the opportunity
3 to meet before; is that correct?

4 A. That is correct.

5 Q. I just have a few questions for you. You made
6 references to having issued several reports in this case,
7 and I want to talk about the others that are not in
8 evidence.

9 You first generated a report in this case on
10 August 12th of 2011; correct?

11 A. Yes.

12 Q. And then you corrected that first report on August
13 19th, 2011?

14 A. Yes, there were some minor corrections that came to
15 my attention which I immediately corrected.

16 Q. And then you supplemented your corrected report on
17 August 25th of 2011?

18 A. Yes, when there was information disclosed that the
19 financials that had been provided to me by AHG were not what
20 they were represented to be, and therefore I had to go back
21 and re-do some analyses because they said one thing and then
22 it was disclosed they actually were calculated a different
23 way.

24 Q. Dr. Langenfeld, it's not that they said one thing.
25 It's that you understood them incorrectly to say something,

Langenfeld - cross

1 and as a result you included a regression analysis.

2 Correct?

3 A. Regression analyses can be useful. I authored
4 several articles. I am an expert on regression analysis.
5 But the problem was your client had financial statements
6 that labeled something called fixed costs. It wasn't my
7 interpretation. It's what it said. That's what it said.
8 It's what was represented in Mr. Ellis's report as fixed
9 costs.

10 So I took it at its word, because there was no
11 additional description of what that was. I looked at it. I
12 took it at its word. And then after the fact was disclosed,
13 well, we are just estimating base costs, and that certainly
14 made the regression analysis not useful because it was
15 modeled so it would be actually fixed costs and not what it
16 was later disclosed to be.

17 Q. The costs that you are referring to is information
18 that AHG allocated its costs to each and every one of its
19 products based on revenue. Right?

20 A. Right, that was not disclosed.

21 Q. And Broetje didn't do that at all. Broetje didn't
22 allocate costs to any of the three system components.

23 Correct?

24 A. No. It has costs for the system components. That's
25 not correct.

Langenfeld - cross

1 Q. So you are saying that you have cost data for the
2 cassettes that is specific to the cassettes?

3 A. Yes. Well, it's similar to what -- I should correct
4 that. It's similar to what the cost information that AHG
5 has, where you have a certain amount of overhead costs, and
6 you have input costs that go into a variety of different
7 products.

8 So it's very similar to what AHG does. It's not
9 everything that is -- it is specific to a project. It's not
10 always specific to every single piece of the project.

11 Q. Doctor, after your first report and your second
12 report, you supplemented your corrected report on August
13 25th and then you did a fourth supplemental report on March
14 21st, 2014. Right?

15 A. Right. Just the way Mr. Ellis had done when we got
16 updated information, that's correct.

17 Q. And it's that fourth report that is in evidence.
18 Correct?

19 A. That would be the most current because it reflects
20 the best information. So the answer to that would be yes.

21 Q. You made reference in your testimony to your
22 assignment. Your assignment was made to you by Broetje. Is
23 that correct?

24 A. By the attorneys I was working with, not directly
25 from Broetje. To clarify. The attorneys are the ones who

1 asked me.

2 MS. SHARP: Your Honor, in the interests of
3 time, we will call Mr. Ellis in rebuttal to address the
4 criticisms that were leveled at him here.

5 THE COURT: Okay. No further questions?

6 MS. SHARP: No further questions.

7 THE COURT: Any redirect?

8 MR. CAHR: No further questions, Your Honor.

9 THE COURT: You may step down. Thank you.

10 (Witness excused.)

11 MR. KELLEHER: Your Honor, we are prepared to
12 rest our case, subject to a motion to move exhibits that may
13 not be in yet.

14 THE COURT: Do you want to do that now?

15 MR. KELLEHER: Now or outside the presence of
16 the jury?

17 THE COURT: Let's do it now.

18 MR. KELLEHER: Exhibits 188, 1173, 1290, 26,
19 1223B, 1223C, 1173. And there may be others, Your Honor.
20 With your permission, we can move them later on.

21 THE COURT: Any objection to those that were
22 just admitted?

23 MR. LINDVALL: No, Your Honor.

24 THE COURT: Any objection to them supplementing
25 later?

1 MR. LINDVALL: No. I assume this list comes
2 from the testimony.

3 THE COURT: Can you represent that?

4 MR. KELLEHER: These have been used, Your Honor,
5 yes.

6 THE COURT: Those are all admitted and you are
7 permitted to supplement.

8 (DTX-188, DTX-1173, DTX-1290, DTX-26, DTX-1223B,
9 DTX-1223C, DTX-1173 admitted into evidence.)

10 THE COURT: So the defense has rested.

11 Mr. Lindvall.

12 MR. LINDVALL: Your Honor, we have a rebuttal
13 witness. But also, with respect to Rule 50, would you like
14 to hear those now?

15 THE COURT: We will wait until later. But it's
16 noted that you have such a motion. So you can call your
17 witness.

18 MR. LINDVALL: I would like to call Mr. Ellis.

19 MS. SHARP: Your Honor, AHG's next witness on
20 rebuttal is Mr. Ellis.

21 THE COURT: Mr. Ellis, come on back.

22 ... DOUGLAS N. ELLIS, having been previously
23 sworn, was examined and testified further as follows...

24 THE COURT: I remind you that you are under
25 oath. You may proceed.

Ellis - direct

1 MS. SHARP: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MS. SHARP:

4 Q. Mr. Ellis, you heard the command. We have only a few
5 minutes to do this. Let's get right to it.

6 You were present in the courtroom to hear Dr.
7 Langenfeld's criticisms of your testimony. Is that correct?

8 A. Yes.

9 Q. So let's start first with the Panduit factors. Is
10 Dr. Langenfeld's analysis of demand correct under the
11 Panduit factors?

12 A. As I understand it, no. The test actually is, is
13 there demand for the patented product? Do customers buy it?
14 It's a simple test.

15 Q. And how is that test satisfied?

16 A. Through sales. I have done dozens, hundreds of
17 cases. It's the same every time.

18 Q. Is Dr. Langenfeld conflating the demand requirement
19 with some other analysis?

20 A. Yes. It's an analysis that's not needed with that
21 factor in Panduit. It is a different idea.

22 Q. Let's just stick with that idea before we go back to
23 the remainder of the Panduit factors.

24 Did you express an opinion about what drives the
25 sales of the accused cassette systems?

Ellis - direct

1 A. Yes. It's the patented technology, the tube and the
2 stop member. It is the whole reason for the cassette. And
3 the cassette is the whole reason that the system was
4 designed, and that's what people buy and that's what drives
5 the sale.

6 Q. There was an inverted triangle. Does the testimony
7 that you are giving now relate at all to the inverted
8 triangle that Dr. Langenfeld referred to?

9 A. It does. I see this, I mean, my every-day comparison
10 is a razor and a blade. You might have a patent on the
11 razor itself, but the money is in the blade. And the
12 patentholder tries to capture all of the value it can
13 through the sales of both of those components. So it's not
14 unusual to see a patented device with smaller sales and all
15 the things that go with it have bigger sales.

16 Q. Then if we can go back to the Panduit factors. You
17 have already talked about demand. I think you previously
18 gave testimony regarding manufacturing and marketing
19 capacity. Do you have any response on the criticisms that
20 Dr. Langenfeld aimed at you on those propositions?

21 A. Yes. My response is that AHG at the time they were
22 working with Broetje was maintaining the actual level of
23 sales that we calculated that AHG would have lost. So they
24 were already able to do that. And then in the more -- of
25 course, the sales dropped off. And it's very hard to ramp

Ellis - direct

1 up a sales force when you have no sales. So they were low
2 for a while. And recently they have taken off and shown
3 that they can handle those sales as well at the back end.

4 Q. Dr. Langenfeld said -- and I am paraphrasing --
5 something like F2C2 only has four employees; therefore, they
6 cannot do the manufacturing. Do you agree with that?

7 A. No. They always had that many. And look at what
8 they are doing now. Their sales are about eight times
9 Broetje's sales in the U.S. today, for the last two years.

10 Q. Is AHG's manufacturing outsourced or is it done at
11 F2C2?

12 A. I think both. It's primarily outsourced. So outside
13 suppliers are the ones who meet that extra demand. And
14 that's how they have always done it.

15 Q. Going to the proposition of acceptable non-infringing
16 substitutes, are hoppers acceptable non-infringing
17 substitutes?

18 A. No. And neither are bowls. These are things that
19 have been around since the eighties, and they kind of faded
20 out in the nineties. And for this application, the only
21 game in town is automated fastener feed systems and cassette
22 delivery systems.

23 Q. Dr. Langenfeld made reference to the ElectroImpact
24 cassette. Is that an acceptable non-infringing substitute?

25 A. No, it's not. We can't trace the one sale of

Ellis - direct

1 ElectroImpact that was made. But we can't show that it
2 happened any time during the damages period. And by the
3 way, ElectroImpact's technology did not survive. They are
4 actually a customer of AHG. They buy their stuff from AHG.

5 Q. In your expert opinion, are the Panduit factors
6 satisfied in this case?

7 A. Yes.

8 Q. Another area of disagreement between your two reports
9 relates to the calculation of the Broetje units sold. What
10 did you rely on for the number of units sold?

11 A. I relied on the sales summaries, the same one that
12 Dr. Langenfeld relied on, that was a secondary source for
13 me.

14 My real source was invoices and delivery slips
15 and things like that.

16 Q. Just to divert to those sales summaries very briefly,
17 how many of those sales summaries did Broetje generate here?

18 A. There were seven. And they were all inconsistent
19 with each other and inconsistent with the underlying
20 documents.

21 Q. Is that what made you go to the underlying documents
22 to get the unit sales correct?

23 A. I think I felt like I had to do that after the second
24 or third one.

25 Q. Another area of disagreement that you have relates to

Ellis - cross

1 costs and how costs are used in unjust enrichment. What is
2 your understanding of who bears the burden of proof on the
3 issue of costs?

4 A. Broetje does. And if they don't give me the stuff I
5 need, I can't calculate it.

6 Q. Did they give you reliable cost data here?

7 A. No. But I asked for it.

8 Q. What was unreliable about their cost data?

9 A. It's at the giant project level. And this thing is
10 so tiny, there is no relation. These projects are custom.
11 The automated fastener feed system was designed once. It's
12 not a custom deal. Custom things are expensive. This
13 system is not.

14 Q. I am now getting the hook. So I thank you for
15 joining us again.

16 THE COURT: Thank you. Cross-examination.

17 CROSS-EXAMINATION

18 BY MR. CAHR:

19 Q. Mr. Ellis, I have one question for you. You said
20 that, just now, that the patent on the tube drives the sales
21 of the cassette. Is that correct?

22 A. I might have said the tube and the stop member. The
23 patented technology is the reason for the existence of the
24 cassette, yes.

25 Q. So all sales are driven by the demand for the

Ellis - cross

1 patented features. Is that what you are saying?

2 A. The sales of the accused cassettes are driven by the
3 demand for the patented technology, yes.

4 Q. So did the trade dress drive any of the sales?

5 A. The trade dress -- again, this is the Coke example --
6 when I look at the Coke bottle, or I guess the can that you
7 guys showed at the beginning, I really want what's inside.
8 But I recognize that by the way it looks. So when people
9 see AHG's cassettes or the ones that look like AHG, they
10 expect something that works and they expect it to be good.

11 Q. So you calculated trade dress damages going back to
12 2003. Correct?

13 A. Again, there is that distinction, if you look at
14 patent damages --

15 Q. I am not making that argument. Just a simple
16 question.

17 A. 2005, or '03, I would be wanting to look at it.

18 Q. And you calculated patent damages up to 2009.
19 Correct?

20 A. December 7, 2009, correct.

21 Q. So there was a period of time when you were
22 calculating damages for both trade dress and patent
23 infringement. Correct?

24 A. Yes.

25 Q. And so it is not possible that the trade dress and

Kytomaa - direct

1 the patented technology were both driving a hundred percent
2 of the sales at the same time. Correct?

3 A. I don't know that I can separate those for that time
4 period.

5 MR. CAHR: No further questions.

6 THE COURT: Redirect.

7 MS. SHARP: I am told I don't have any.

8 THE COURT: You may step down. Thank you.

9 (Witness excused.)

10 THE COURT: What's next?

11 MR. LINDVALL: We have one last witness. Dr.
12 Kytomaa, please.

13 ... HARRI KYTOMAA, having been previously sworn,
14 was examined and testified further as follows ...

15 MR. LINDVALL: Dr. Kytomaa will be talking about
16 testimony relating to Mr. Lawrence's testimony about
17 validity.

18 THE COURT: Welcome back, Dr. Kytomaa. I remind
19 you you remain under oath.

20 DIRECT EXAMINATION

21 BY MR. LINDVALL:

22 Q. Could we have DTX-149, please. You listened to the
23 testimony of Mr. Lawrence. Correct?

24 A. Yes, I did.

25 Q. You understand he gave testimony about invalidity

Kytomaa - direct

1 based on Shinjo and Offutt. Correct?

2 A. Yes, that's correct.

3 Q. And there wasn't any other references that you heard.
4 Correct?

5 A. That's correct.

6 Q. Now, with respect to Shinjo, could you explain to the
7 jury -- first of all, is it your opinion that Shinjo does
8 not invalidate any of the claims of the two patents?

9 A. Yes. It's my opinion that it does not invalidate.

10 Q. What is that opinion based on?

11 A. It's based on my review of the patents.

12 Q. Okay. Could you give the jury an explanation of why
13 you believe that with Shinjo?

14 A. Yes. To render the patent invalid, the Shinjo patent
15 must have all the elements of any one claim. And so I went
16 through the analysis, as did Mr. Lawrence earlier today, and
17 it just does not. It is as simple as that. It does not
18 contain all the elements of any one claim.

19 Q. Which elements does Shinjo not contain, after hearing
20 Mr. Lawrence's claim?

21 A. There are many elements it does not contain.

22 Q. Can you give the jury a couple?

23 A. It does not have any passageways or grooves.
24 Specifically, the Shinjo patent describes a channel, which
25 is the entire cross-sectional area of the tubes that are

Kytomaa - direct

1 shown here.

2 It does not provide peripheral guiding, which is
3 in the elements of the claim.

4 It does not have objects that have axes of
5 symmetry, inputs don't have axes of symmetry.

6 The nuts are not aligned in the direction of the
7 length of the tube, as is required by both the '216 and the
8 '339 patent.

9 Those are some examples.

10 Q. If we turn to PDTX-150, please. What does this
11 represent?

12 A. This image represents what I just mentioned. In
13 fact, there is a definition here. As you can see, I will
14 read it, "As shown in Figure 2, the tube 2 has a rectangular
15 cross-sectional configuration and the inner walls of the
16 tube 2 define channels 2a."

17 So the grooves that Mr. Lawrence spoke about,
18 actually, are actually the yellow channel.

19 Q. These yellow channels, are these grooves, according
20 to the patent?

21 A. Those yellow channels are not grooves or passageways.
22 According to this patent, they are just the channel of the
23 rectangular tube.

24 Q. Now, if I could turn to -- let me ask you this
25 question: Does Shinjo have any stop members?

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1 A. No, it does not.

2 Q. If we could pull up DTX-1031, please.

3 This is it.

4 Why not?

5 A. Well, what I am showing you here is actually Mr.
6 Lawrence's exhibit. And as you can see, Mr. Lawrence put up
7 this slide that says stop members and then he highlights
8 Items 6 and 7, right out of the Shinjo patent, and says
9 these are stop members.

10 Q. If we could turn to Slide PDTX-148. What does this
11 represent?

12 A. If you read the Shinjo patent as to what Item 6 and 7
13 are, and I have just provided the language here, I will
14 read, "The body 2 includes a pneumatic inlet opening 6 at an
15 inner end 4 and a pneumatic output opening 7."

16 So 6 and 7 are the opposite of stop members.
17 They are actually designed to allow air in and out. They
18 are openings, not closings.

19 Q. Okay. If we could turn to PDTX-151, please.

20 I believe you testified just a minute ago that
21 Shinjo does not show peripheral guiding; is that correct?

22 A. That's correct. The claim elements of both the '216
23 and '339 patents require guiding of the rivets and the
24 objects that pass through the tube.

25 The Shinjo patent, and specifically peripheral

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1 guiding, so guiding around the periphery of those objects,
2 if you read the detail of Shinjo -- and I will read here and
3 I highlighted the key piece:

4 The self-piercing nuts 8 are disposed so as to
5 be slideable on only one of the inside walls.

6 Okay? So this is not peripheral guiding, and
7 this is actually also shown in an image that we had at the
8 very beginning. If you could bring that back up, because I
9 want to show the surface that is guiding in Shinjo is not
10 the periphery, it's the image of the nuts within.

11 Q. Let's have PDTX-149, please.

12 A. So you can see the nuts are up against the right
13 side. So the nuts are only sliding on that surface, make no
14 contact with any other part of the channel. That is because
15 they go around and centrifugal force is pushing against that
16 side.

17 Q. All right. Let's switch quickly to PDTX-142, please.

18 And you heard Mr. Lawrence give some testimony
19 about Offutt; is that correct?

20 A. I did.

21 Q. And does Offutt invalidate any of the claims of the
22 patent?

23 A. It does not.

24 Q. Why not?

25 A. Well, Offutt as a matter of background, Offutt is

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1 the Second World War era patent, of the very era of Rosy the
2 Riveter. This is a male riveter. And this is filed during
3 the war, awarded immediately after the war. And it shows
4 the technology, obviously very old technology which was a
5 circular tube technology. As you heard from Mr. Lawrence, I
6 agree that the tube contains rivets, and you sort of kind of
7 hang it over your shoulder as you can see here. And No. 20,
8 in the fellow's left-hand side here, is simply a device like
9 a chuck that allows him to place rivets into predrilled
10 holes.

11 Q. Okay. Let's look at DTX-1029, please.

12 And this is the Offutt patent; correct?

13 A. That's right. So this is the device that the
14 gentleman is holding in his left hand.

15 Q. Now, are there any grooves in any of these devices?

16 A. There are no grooves at all. These are circular
17 cross-sections.

18 Q. And you are looking at Figures 2 and 4 and 1; is that
19 correct?

20 A. Yes. I have actually looked at all of the figures of
21 this entire patent.

22 Q. Let's switch quickly to PDTX-66, please.

23 And this is a slide that the Broetje showed
24 during their opening statement. And do you recall this
25 slide?

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1 A. I remember seeing this slide, yes.

2 Q. Okay. And it says it does not infringe and this
3 might infringe. Do you agree with that?

4 A. I do not agree with that.

5 Q. Let's look at PDTX-67, please.

6 Now, you have modified this slide; correct?

7 A. Yes.

8 Q. And why did you modify it?

9 A. Well, all I did here is I utilized -- as you can see,
10 the right-hand side drawing which is from Broetje is an
11 excerpt from an engineering drawing, and the excerpt from
12 the engineering drawing shows, along a black dotted line,
13 the hollow center of the tube. And that's a very important
14 concept in the patents, in the '216 and '339 patents because
15 the rivets have to be compatible with that hollow center as
16 you have already heard many times I'm sure.

17 Q. Okay.

18 A. So I highlighted, in yellow, the hollow center in
19 both.

20 Q. Let's look at PDTX-68, please.

21 So what are you showing here?

22 A. What I'm showing here are the passageways or the
23 grooves in both of these geometrical shapes, cross-sections
24 of tubes.

25 Q. Okay. And this one is represented as Broetje's;

1 correct?

2 A. Yes. As you can see, both the grooves open into the
3 hollow center as required by the claim construction in both
4 cases.

5 Q. What is your opinion again with respect to Broetje's
6 product, whether it infringes or not?

7 A. So both of these infringe.

8 MR. LINDVALL: Thank you. I have no further
9 questions.

10 THE COURT: Any cross?

11 MR. KELLEHER: Nothing at this time, Your Honor,
12 in the interest of time.

13 THE COURT: Okay. You may step down.

14 THE WITNESS: Thank you.

15 THE COURT: Thank you.

16 Mr. Lindvall.

17 MR. LINDVALL: No further witnesses, Your Honor.

18 THE COURT: Okay. So you rest?

19 MR. LINDVALL: Yes, Your Honor.

20 THE COURT: Okay. Mr. Kelleher.

21 MR. KELLEHER: We rest as well, Your Honor,
22 subject to making a motion on the exhibits submitted.

23 THE COURT: So that completes the evidence?

24 MR. KELLEHER: And we make the usual motion. We
25 renew the usual motion.

1 MR. LINDVALL: We may have some exhibits. We'll
2 look at it. We'll both look at our notes and see if we have
3 exhibits.

4 THE COURT: Okay. Is there anything else,
5 Mr. Kelleher? No?

6 MR. KELLEHER: We move under 50(a) we carried
7 the burden on our defense.

8 THE COURT: Right. Okay. We'll talk about the
9 motions further at a break, but no further evidence from
10 either side; correct, Mr. Kelleher?

11 MR. KELLEHER: (Nodding yes.)

12 MR. LINDVALL: Correct.

13 THE COURT: All right. Thank you. Ladies and
14 gentlemen of the jury, as you have heard, we are done with
15 the evidentiary portion of the trial. There are no further
16 witnesses or testimony.

17 What remains is for me to instruct you on the
18 law and for you to hear closing arguments from both sides.
19 The way we're going to proceed is I'm going to read you most
20 but not all of the jury instructions today, but as you will
21 see shortly, it's a fairly lengthy document and it's not
22 100 percent finished yet, so I'm going to need a little bit
23 of time to finish up my work and pull that together. So as
24 a result, I'm going to give you your afternoon break now and
25 it's going to be a longer break.

1 Please be ready to begin at 3:15. So you're
2 free, if you wish, to go out. That's fine. But be back
3 here in time so that if I do manage to get my work done,
4 I'll be ready to read these instructions to you at 3:15.

5 Once I have finished reading the portion of
6 instructions you need to hear today, we'll let you go for
7 today, and then tomorrow morning you will hear the closing
8 arguments, and you will hear the remainder of my
9 instructions.

10 In the time between now and when I next see you,
11 no talking about the case; and you are free until 3:15.

12 (Jury left courtroom.)

13 THE COURT: All right. Just a few quick
14 questions -- have a seat -- regarding the jury instructions
15 before we go print them off for everyone.

16 On the foreign law proposal that we had, any
17 comments or concerns or objections from the plaintiff?

18 MR. LINDVALL: No, Your Honor.

19 THE COURT: And how about from the defendant?

20 MR. KELLEHER: Your Honor, we had one
21 suggestion. Four lines up from the bottom where it says
22 "United States law," to say after that, "and the plaintiffs
23 are not asserting a breach of contract claim here."

24 THE COURT: Is there any objection to me adding
25 that?

1 MR. LINDVALL: Your Honor, I think it just
2 complicates the matter and brings it, the concept of breach
3 back into the case. I guess -- I don't want to say we're
4 asserting it, but, you know, there has been representations
5 they don't breach, and I just think it causes confusion.
6 It's better to leave it the way you had it. I think it's a
7 lot clearer that way.

8 THE COURT: I'm going to add that because
9 I'm afraid otherwise it might imply to the jury that they
10 should be concerned about a breach when I'm telling them
11 that they shouldn't be concerned about a breach and that
12 they shouldn't be concerned about a breach overseas. So
13 in any event, I will add the phrase requested by the
14 defendants.

15 On statute of limitations -- and by the way,
16 after I read through the instructions, either later today or
17 sometime tomorrow, I'll put on the record our reasoning for
18 the decisions that you will see embodied in the instructions
19 but I'm not going to make the jury sit here waiting for me
20 to do that.

21 On statute of limitations, there, the conceptual
22 agreement yesterday, the first time it comes up, what I have
23 in front of me now is currently labeled 11.6. I don't know
24 what it was yesterday, but let me just read this to you and
25 make sure it sounds as if it accurately reflects the agreement

1 that conceptually that two or three year whatever window
2 changes going forward and that plaintiffs aren't trying to
3 recapture older infringement under the continuous infringement
4 doctrine.

5 So I'm going to say something along the lines
6 of: The Broetje Parties contend that AHG's lawsuit was not
7 filed within the time set by law. I instruct you that you
8 can only find the Broetje Parties liable for trade dress
9 infringement that AHG proves occurred after particular date,
10 here May 12th, 2006. You cannot find the Broetje Parties
11 liable for any trade dress infringement that may have
12 occurred before May 12th, 2006.

13 Does that sound consistent with the plaintiffs'
14 view?

15 MR. LINDVALL: I believe so, Your Honor.

16 THE COURT: Okay. Defendants, does that sound
17 consistent?

18 MR. CAHR: Yes, I think that is correct.

19 THE COURT: All right. Well, we'll go pull
20 these together. We will try to get you copies to look at
21 before I start reading them to the jury. But in any event,
22 I'll be reading them to the jury at 3:15 or thereabouts.

23 We will be in recess.

24 (Brief recess taken.)

25 * * *

1 (Proceedings reconvened after recess.)

2 THE COURT: All right. Before we bring the jury
3 in, for the record, we finished the jury instructions. We
4 sent in two copies for each side as soon as we got them
5 printed. We'll get them docketed.

6 I will be reading as much as I can, certainly
7 not past page 95 and I'm doubtful I will get that far. I
8 have another matter at 4:30 so I'll be stopping no later
9 than 4:25 and we'll see how far I get.

10 The verdict sheet we'll get to you some time
11 this evening you will be seeing it.

12 Are there any questions before I bring the jury
13 in?

14 MR. LINDVALL: No. The only thing, Your Honor,
15 on the statute of limitations, I know you read it in, but do
16 you accept these factors continue to accrue doctrine.

17 THE COURT: Yes, what I have written and read to
18 you was meant to capture that.

19 MR. LINDVALL: I see.

20 THE COURT: Which was by agreement as I
21 understood it yesterday. Is there anything from defendants?

22 MR. KELLEHER: No, Your Honor.

23 THE COURT: Okay. And I will put my reasoning
24 on the record.

25 MR. LINDVALL: Your Honor, there is our motions,

1 our post-trial motions.

2 THE COURT: Not right now.

3 MR. LINDVALL: Okay.

4 THE COURT: We'll do that probably tomorrow
5 morning at this point.

6 MR. LINDVALL: Okay.

7 THE COURT: Okay. Thank you. We'll bring the
8 jury in.

9 (Jury returned.)

10 THE COURT: Welcome back, ladies and gentlemen.
11 Mr. Golden, before you sit down, if you could pass to our
12 jurors their copy of the final instruction. It's a very
13 long document, as you can see. We will not get through all
14 of it this afternoon. I promise you that you will be out of
15 here by 4:30 today and we'll pick up wherever we leave off
16 in the morning.

17 As with the preliminary instructions, this is
18 your copy. Feel free to read along as I read it to you,
19 your choice, but you will have your copy with you in the
20 juryroom when I deliberate. I'm going to begin on page 1.

21 Section 1 is entitled General Instructions - End
22 of Trial.

23 1.1. Introduction.

24 Members of the jury, now it is time for me to
25 instruct you about the law that you must follow in deciding

1 this case.

2 I will start by explaining your duties and the
3 general rules that apply in every civil case.

4 I will explain some rules that you must use in
5 evaluating particular testimony and evidence.

6 I will then explain the positions of the parties
7 and the law you will apply in this case.

8 Finally, I will explain the rules that you must
9 follow during your deliberations in the juryroom and the
10 possible verdicts that you may return.

11 Please listen very carefully to everything I
12 say.

13 You will have your written copy of these
14 instructions with you in the juryroom for your reference
15 during your deliberations. You will also have a verdict
16 form, which will list the questions that you must ask answer
17 to decide this case.

18 1.2. Duty of the Jury.

19 You have two main duties as jurors. The first
20 one is to decide what the facts are from the evidence you
21 saw and heard here in court. Deciding what the facts are is
22 your job, not mine, and nothing that I have said or done
23 during this trial was meant to influence your decision about
24 the facts in any way.

25 Your second duty is to take the law that I give

1 you, apply it to the facts, and decide under the appropriate
2 burden of proof, which party should prevail on each of the
3 issues presented. It is my job to instruct you about the
4 law, and you are bound by the oath that you took at the
5 beginning of the trial to follow the instructions that I
6 give you, even if you personally disagree with them. This
7 includes the instructions that I gave you before and during
8 the trial, and these instructions. All of these instructions
9 are important, and you should consider them together as a
10 whole.

11 Perform these duties fairly. Do not let any
12 bias, sympathy or prejudice that you may feel toward one
13 side or the other influence your decision in any way.

14 1.3. Evidence Defined.

15 You must make your decision based only on the
16 evidence that you saw and heard here in court. Do not let
17 rumors, suspicions, or anything else that you may have seen
18 or heard outside of court influence your decision in any way.

19 The evidence in this case includes only what the
20 witnesses said while they were testifying under oath
21 (including deposition testimony that has been played or read
22 to you), the exhibits that I allowed into evidence, and the
23 stipulations that the lawyers agreed to. I don't believe
24 there were any, but if there were, I would have read them to
25 you at the beginning of the case.

1 Nothing else is evidence. The lawyers'
2 statements and argument are not evidence. Their questions
3 and objections are not evidence. My legal rulings are
4 not evidence. Any of my comments and questions are not
5 evidence. The notes taken by any juror are not evidence.

6 During the trial I may have not let you hear the
7 answers to some of the questions that the lawyers asked. I
8 also may have ruled that you could not see some of the
9 exhibits that the lawyers wanted you to see. You must
10 follow my orders and completely ignore all of these things.
11 Do not even think about them. Do not speculate about what a
12 witness might have said or what an exhibit might have shown.
13 These things are not evidence, and you are bound by your
14 oath not to let them influence your decision in any way.

15 Further, sometimes I may have ordered you to
16 disregard things that you saw or heard, or struck things
17 from the record. You must follow my instructions to
18 completely disregard such things you saw or heard, and
19 completely ignore those things struck from the record. Do
20 not even think about them. These things are not evidence,
21 and you are bound by your oath not to let them influence
22 your decision in any way.

23 Make your decision based only on the evidence,
24 as I have defined it here, and nothing else.

25 1.4. Direct and Circumstantial Evidence.

1 You may have heard the terms "direct evidence"
2 and "circumstantial evidence."

3 Direct evidence is simply evidence like the
4 testimony of an eyewitness which, if you believe it,
5 directly proves a fact. If a witness testified that he saw
6 it raining outside, and you believe him, that would be
7 direct evidence that it was raining.

8 Circumstantial evidence is simply a chain of
9 circumstances that indirectly proves a fact. If someone
10 walked into the courtroom wearing a raincoat covered with
11 drops of water and carrying a wet umbrella, that would be
12 circumstantial evidence from which you could conclude that
13 it was raining.

14 It is your job to decide how much weight to give
15 the direct and circumstantial evidence. The law makes no
16 distinction between the weight that you should give to
17 either one, nor does it say that one is any better evidence
18 than the other. You should consider all of the evidence,
19 both direct and circumstantial, and give it whatever weight
20 you believe it deserves.

21 1.5. Consideration of Evidence.

22 You should use your common sense in weighing
23 the evidence. Consider it in light of your everyday
24 experience with people and events, and give it whatever
25 weight you believe it deserves. If your experience tells

1 you that certain evidence reasonably leads to a conclusion,
2 you are free to reach that conclusion.

3 1.6. Statements of Counsel.

4 A further word about statements and arguments
5 of counsel. The attorneys' statements and argument are not
6 evidence. Instead, their statements and arguments are
7 intended to help you review the evidence presented. If you
8 remember the evidence differently from the attorneys, you
9 should rely on your own recollection.

10 The role of attorneys is to zealously and
11 effectively advance the claims of the parties they represent
12 within the bounds of the law. An attorney may argue all
13 reasonable conclusions from evidence in the record. It is
14 not proper, however, for an attorney to state an opinion as
15 to the truth or falsity of any testimony or evidence. What
16 an attorney personally thinks or believes about the testimony
17 or evidence in a case is not relevant, and you are instructed
18 to disregard any personal opinion or belief concerning test-
19 imony or evidence that an attorney has offered during opening
20 or closing statements, or at any other time during the
21 course of the trial.

22 1.7. Credibility of Witnesses.

23 You are the sole judges of each witness's
24 credibility. You should consider each witness's means of
25 knowledge; strength of memory; opportunity to observe; how

1 reasonable or unreasonable the testimony is; whether it is
2 consistent or inconsistent; whether it has been contradicted;
3 the witness's biases prejudices or interests; the witness's
4 manner or demeanor on the witness stand; and all circumstances
5 that, according to the evidence, could affect the credibility
6 of the testimony. If you find the testimony to be contra-
7 dictory, you must try to reconcile it, if reasonably possible,
8 so as to make one harmonious story of it all. But if you
9 can't do this, then it is your duty and privilege to believe
10 the testimony that, in your judgment, is most believable
11 and disregard any testimony that, in your judgment, is not
12 believable.

13 In determining the weight to give to the
14 testimony of a witness, you should ask yourself whether
15 there was evidence tending to prove that the witness
16 testified falsely about some important fact and whether
17 there was evidence that at some other time the witness said
18 or did something, or failed to say or do something, that was
19 different from the testimony the witness gave at the trial.
20 You have the right to distrust such witness's testimony in
21 other particulars and you may reject all or some of the
22 testimony of that witness or give it such credibility as you
23 may think it deserves.

24 You should remember that a simple mistake by a
25 witness does not necessarily mean that the witness was not

1 telling the truth. People may tend to forget some things or
2 remember other things inaccurately. If a witness has made
3 a misstatement, you must consider whether it was simply an
4 innocent lapse of memory or an intentional falsehood, and
5 that may depend upon whether it concerns an important fact
6 or an unimportant detail.

7 This instruction applies to all witnesses.

8 1.8. Number of Witnesses.

9 One more point about the witnesses. Sometimes
10 jurors wonder if the number of witnesses who testified makes
11 any difference.

12 Do not make any decisions based on the number of
13 witnesses who testified. What is more important is how
14 believable the witnesses were, and how much weight you think
15 their testimony deserves. Concentrate on that, not the
16 numbers.

17 1.9. Expert Witnesses.

18 Expert testimony is testimony from a person who
19 has a special skill or knowledge in some science, profession,
20 or business. This skill or knowledge is not common to the
21 average person but has been acquired by the expert through
22 special study or experience.

23 In weighing expert testimony, you may consider
24 the expert's qualifications, the reasons for the expert's
25 opinion, and the reliability of the information supporting

1 the expert's opinions, as well as the factors I have
2 previously mentioned for weighing testimony of any other
3 witness. Expert testimony should receive whatever weight
4 and credit you think appropriate, given all the other
5 evidence in the case. You are free to accept or reject the
6 testimony of experts, just as with any other witness.

7 1.10. Deposition Testimony.

8 A deposition is the sworn testimony of a witness
9 taken before trial. The witness is placed under oath and
10 swears to tell the truth, and lawyers for each party may ask
11 questions. A court reporter is present and records the
12 questions and answers. The deposition may also be recorded
13 on videotape.

14 During the trial, certain testimony was
15 presented to you by the reading of a deposition transcript
16 or the playing of video excerpts from a deposition.
17 Deposition testimony is entitled to the same consideration
18 and is to be judged, insofar as possible, in the same way as
19 if the witness had been present to testify.

20 1.11. Burdens Of Proof.

21 AHG is accusing the Broetje Parties of patent
22 infringement, trade dress infringement, unfair competition,
23 and intentional interference with prospective economic
24 advantage. AHG has the burden of proving its claims and the
25 amount of its money damages, if any, by what is called a

1 preponderance of the evidence. That means AHG has to
2 produce evidence which, when considered in light of all of
3 the facts, leads you to believe that what AHG claims is more
4 likely true than not. To put it differently, if you were to
5 put the evidence of AHG and the Broetje Parties concerning
6 infringement on opposite sides of a scale, the evidence
7 supporting AHG's claims would have to make the scales tip
8 somewhat on its side in each instance. If the scale should
9 remain equal or tip in favor of the Broetje Parties, you
10 must find for the Broetje Parties. If you find that the
11 Broetje Parties infringed one or more of the patent claims
12 that have been asserted in this case, then as a separate
13 question, AHG has the burden of proving its additional
14 contention that the infringement was willful by clear and
15 convincing evidence. Clear and convincing evidence is
16 evidence that produces an abiding conviction that the truth
17 of a factual contention is highly probable. Proof by clear
18 and convincing evidence is, thus, a higher burden than proof
19 by a preponderance of the evidence.

20 In this case, in addition to denying AHG's
21 claims, the Broetje Parties assert that all of the asserted
22 patents are invalid. The asserted patents, however, are
23 presumed to be valid. The Broetje Parties have the burden
24 of proving that the asserted patents are invalid by clear
25 and convincing evidence. As I just mentioned, clear and

1 convincing evidence is evidence that produces an abiding
2 conviction that the truth of a factual contention is highly
3 probable. Proof by clear and convincing evidence is, thus,
4 a higher burden than proof by a preponderance of the
5 evidence.

6 Those of you familiar with criminal cases will
7 have heard the term "proof beyond a reasonable doubt." That
8 burden does not apply in a civil case and you should,
9 therefore, put it out of your mind in considering whether or
10 not AHG or the Broetje Parties have met their burden of
11 proof.

12 1.12. Use Of Notes.

13 You may use notes taken during trial to assist
14 your memory. However, you should use caution in consulting
15 your notes. There is always a tendency to attach undue
16 importance to matters that you have written down. Some
17 testimony that is considered unimportant at the time
18 presented and thus not written down takes on greater
19 importance later on in the trial in light of all the
20 evidence presented. Therefore, you are instructed that your
21 notes are only a tool to aid your own individual memory, and
22 you should not compare notes with other jurors in
23 determining the content of any testimony or in evaluating
24 the importance of any evidence. Your notes are not
25 evidence, and are by no means a complete outline of the

1 proceedings or a list of the highlights of the trial. You
2 should not be overly influenced by your notes or those of
3 your fellow jurors. Above all, your memory should be the
4 greatest asset when it comes time to deliberate and render a
5 decision in this case.

6 We are now up to Section 2. The Parties And
7 Their Contentions.

8 2.1. The Parties.

9 I will now review for you the parties in this
10 action, and the positions of the parties that you will have
11 to consider in reaching your verdict.

12 The plaintiffs are Ateliers de la Haute-Garonne
13 and F2C2 Systems S.A.S. When I refer to the plaintiffs
14 collectively, I will refer to them as AHG.

15 The defendants in this case are Broetje
16 Automation-USA Inc. and Broetje-Automation GmbH. When I
17 refer to the defendants collectively, I will refer to them
18 as "Broetje" or "The Broetje Parties."

19 AHG is the owner of U.S. Patent Nos. 5,143,216
20 and 5,011,339. I will refer to these patents as the '216
21 and '339 patents respectively, or collectively as "the's AHG
22 patents" or the "asserted patents."

23 2.2. The Parties' Contentions.

24 AHG contends that Broetje's rivet dispensing
25 cassettes infringe Claims 1, 2 and 6 of the '339 patent, and

1 Claims 1 and 2 of the '216 patent. These claims may be
2 referred to as the "asserted claims."

3 Broetje contends that its rivet dispensing
4 cassettes do not infringe the asserted claims of the '339
5 and '216 patents. Broetje further contends that the
6 asserted claims of the '339 and '216 patents are invalid.

7 AHG also contends that Broetje's cassettes
8 infringe on AHG's trade dress, that Broetje unfairly
9 competes with AHG through its manufacture and sale of
10 cassettes, and that Broetje intentionally interfered with
11 AHG's prospective economic advantage with respect to such
12 cassettes. Broetje denies these claims.

13 3.0. Patent Claims.

14 3.1. Summary Of Patent Issues.

15 I will now summarize the patent issues that you
16 must decide and for which I will provide instructions to
17 guide your deliberations. You must decide the following
18 main issues:

19 1. Whether AHG has proven by preponderance of
20 the evidence that the Broetje Parties' accused products
21 infringed any of Claims 1, 2, or 6 of the '339 or Claims 1
22 or 2 of the '216 patent, either directly or indirectly.

23 2. Whether AHG has proven by a preponderance of
24 the evidence that the Broetje Parties induced or contributed
25 to the infringement by a third party of any of Claims 1, 2,

1 or 6 of the '339 patent.

2 3. Whether AHG has proven by clear and
3 convincing evidence that the Broetje Parties willfully
4 infringed any of Claims 1, 2 or 6 of the '339 patent, or
5 Claims 1 or 2 of the '216 patent.

6 4. Whether the Broetje Parties have proven by
7 clear and convincing evidence that any of Claims 1, 2, or 6
8 of the '339 patent, or Claims 1 or 2 of the '216 patent, are
9 invalid due to anticipation, obviousness, or indefiniteness.

10 3.2. The Patent Laws.

11 At the beginning of the trial, I gave you some
12 general information about patents and the patent system and
13 a brief overview of the patent laws relevant to this case.
14 I will now give you more detailed instructions about the
15 patent laws that specifically relate to this case. If you
16 would like to review my instructions at any time during your
17 deliberations, you will have your copy available to you in
18 the jury room.

19 3.3. Infringement Of Patent Claims.

20 Before you can decide many of the issues in this
21 case, you will need to understand the role of patent
22 "claims."

23 The claims of a patent are the numbered
24 paragraphs at the end of the patent. The claims are
25 important because it is the words of the claims that define

1 what a patent covers. Only the claims of a patent can be
2 infringed. Each claim is a separate statement of the
3 patented invention, and each of the asserted claims must be
4 considered individually, comparing that claim to a
5 particular product.

6 In patent law, the requirements of a claim are
7 often referred to as "claim elements" or "claim
8 limitations." When a thing (such as a product) meets each
9 and every requirement of a claim, the claim is said to
10 "cover" that thing, and that thing is said to "fall" within
11 the scope of that claim.

12 The law says that it is my role to define terms
13 of the claims and it is your role to apply my definitions to
14 the issues that you are asked to decide in this case.
15 Therefore, I will explain to you the meaning of some of the
16 words of the claims in this case. In doing so, I will
17 explain some of the requirements of the claims and you must
18 accept my definitions of these words in the claims as
19 correct.

20 It is your job to take these definitions and
21 apply them to the issues you are deciding, such as
22 infringement and validity.

23 3.4. Claim Construction For The Case.

24 It is the Court's duty under the law to define
25 what the patent claims mean. I have made my determinations

1 and I will now instruct you on the meaning of the claim
2 terms. You must use the meaning that I give you for each
3 claim term to make your decision as to whether the claim is
4 infringed or invalid, and you must apply the same meaning
5 for purposes of both your infringement and your invalidity
6 analyses. You must ignore any different definitions used by
7 the witnesses or the attorneys. You should not take my
8 definition of the language of the claims as an indication
9 that I have a view regarding how you should decide the
10 issues that you are being asked to decide, such as
11 infringement and validity. For a claim term for which I
12 have not provided you with a definition, you should apply
13 the plain and ordinary meaning. These issues are yours to
14 decide.

15 I instruct you that the following claim terms
16 have the following definition: The following words and
17 groups of words from the '339 patent claims have the
18 following meanings:

19 1. The term "shape corresponding to the
20 transverse section of the greatest diameter of the pieces"
21 means "the shape of the hollow center of the tube is
22 compatible with the greatest diameter of the pieces."

23 2. The term "a peripheral guiding" means
24 "provides for guiding of the pieces along the internal
25 surface of the tube."

1 3. The term "arranging the pieces one after
2 another in the interior of the tube (2) with their axes of
3 revolution extending along the longitudinal axis of said
4 tube" means "pieces inserted one after another with their
5 axes of revolution extending in the direction of the length
6 of the tube."

7 4. The term "longitudinal passageway (2b)...
8 opening into the hollow center (2a)" means "a passageway
9 which can be of any hollow shape, regardless of the
10 cross-sectional of the tube, extending in the direction of
11 the length of the tube."

12 5. The term "the spaces (E) between the pieces"
13 means "the openings, if any, separating the pieces."

14 6. The term "linear grooves (2b)" means
15 "passageways extending along the parallel axis of the tube."

16 7. The term "grooves" or "grooves (2b)" means
17 "passageways."

18 8. The term "stop members (3,4)" and "stop
19 member 4" mean "components at the ends of the tube that
20 retain the pieces."

21 The following words and groups of words from the
22 '216 patent have the following definitions:

23 1. The term "aligned one after another" means
24 "pieces are in line one after the other."

25 2. The term "grooves (2b)...to open into a

1 hollow center" means "any passageway, regardless of the
2 cross-sectional shape of the tube, extending along the wall
3 of the tube, this passageway being able to be linear,
4 helical, et cetera and opening into the hollow center of the
5 tube."

6 3. The term "stop members (3,4)" means
7 "components at the end of the tube that retain the pieces."

8 4. The term "arranged in a column" means
9 "rivets placed one after the other in a tube."

10 5. The term "transverse cross-section of the
11 heads correspond to the transverse cross-section of the tube
12 such that the cross-sectional area of the heads
13 substantially equals the cross-sectional area of the tube"
14 means "the shape of the head of the rivet is compatible with
15 the shape of the hollow center of the tube such that the
16 cross-sectional area of the head of the rivet is of
17 sufficient size as compared to the cross-sectional area of
18 the hollow core of the tube such that there is sufficient
19 space between the rivet and the surface of the hollow core
20 to permit the rivet to move without difficulty from upstream
21 to downstream as a result of the compressed fluid ."

22 6. The term "grooves (2b)" means "passageways."

23 3.5. Independent And Dependent Claims.

24 This case involves two types of patent claims:
25 independent claims and dependent claims.

1 An independent claim sets forth all of the
2 requirements that must be met in order to be covered by that
3 claim. Thus, it is not necessary to look at any other claim
4 to determine what an independent claim covers. In this
5 case, Claim 1 of the '339 patent and Claim 1 of the '216
6 patent are independent claims.

7 The remaining asserted claims are dependent
8 claims. A dependent claim does not itself recite all of the
9 requirements of the claim but refers to another claim or
10 claims for some of its requirements. In this way, the claim
11 "depends" on another claim or claims. A dependent claim
12 incorporates all of the requirements of the claims to which
13 it refers. The dependent claim then adds its own additional
14 requirements. To determine what a dependent claim covers,
15 it is necessary to look at both the dependent claim and any
16 other independent claim to which it refers.

17 3.6. Open-Ended Or "Comprising" Claims.

18 The beginning portion or preamble of several of
19 the asserted claims has the word "comprising." The word
20 "comprising" means "including the following but not
21 excluding others." A claim that uses the word "comprising"
22 or "including" is not limited to products having only the
23 elements that are recited in the claim, but also covers
24 products that have additional elements.

25 If you find, for example, that the accused

1 products include all of the elements of a particular claim,
2 the fact that the accused products might include additional
3 elements would not avoid infringement of the claim.

4 Now, 4.0. Patent Infringement.

5 4.1. Patent Infringement Generally.

6 I will now instruct you on the rules that you
7 must follow when the deciding whether AHG has proven by a
8 preponderance of the evidence that the Broetje Parties
9 infringed the asserted claims.

10 Patent law gives the owner of a valid patent the
11 right to keep others from making, using, selling, or
12 offering to sell a patented product within the United States
13 during the term of the patent. The claims of AHG's patents
14 each specifically define a particular type of method and
15 apparatus for dispensing and storing rivets. Any person or
16 business entity that has made, used, sold, or offered to
17 sell a patented product in the United States during the term
18 of the patent, without the patent owner's permission,
19 infringes the patent, so long as the patent is not found to
20 be invalid.

21 To prove infringement, AHG must prove by a
22 preponderance of the evidence that each accused product,
23 standing alone, contains each and every one of the elements
24 of the patent claim that is asserted against the product.
25 If a particular product does not contain each and every

1 element of the claim, you must find that the product does
2 not infringe.

3 If, as here, the patent owner asserts multiple
4 patent claims against the same product, then you must
5 compare each claim separately against the product to
6 determine whether the product infringes that individual
7 patent claim.

8 4.2. Direct Infringement.

9 To prove direct infringement, AHG must prove
10 that it is more probable than not that one of the Broetje
11 Parties' accused products includes every requirement in at
12 least one of the asserted claims. The presence of other
13 elements beyond those claimed does not avoid infringement,
14 as long as each and every claimed element is present in the
15 accused product. Additionally, a component or feature of
16 the accused products can be part of a larger integral
17 structure (a single structure that has two or more connected
18 parts) and still satisfy a claim requirement. In such a
19 case, the remainder of the integral structure is considered
20 extra structure and is irrelevant to whether the claim
21 requirement is satisfied by the accused products. However,
22 if the accused product omits a single requirement recited in
23 one of the asserted claims, then that accused product does
24 not directly infringe that claim.

25 For direct infringement, AHG is not required to

1 prove that the Broetje Parties intended to infringe or knew
2 of the patent.

3 4.3. Indirect Infringement - Inducing Patent
4 Infringement.

5 A party induces patent infringement if it
6 causes, urges or encourages another to infringe a claim of
7 the patent which it is aware of or of which it is willfully
8 blind. Inducement to infringe a claim cannot occur
9 unintentionally. This is different from direct
10 infringement, which, as I have told you, can occur
11 unintentionally.

12 AHG alleges that the Broetje Parties are liable
13 for infringement by actively inducing others to directly
14 infringe the '339 patent. More particularly, AHG asserts
15 that the Broetje Parties induced patent infringement after
16 they became aware of the '339 patent. To be liable for
17 inducement to infringe, the accused inducer must have known
18 of the patent and encouraged or instructed another person
19 how to use a product in a manner that you, the jury, find
20 infringes the asserted claims and must have had knowledge,
21 or have acted with willful blindness, that the induced acts
22 constituted patent infringement. Willful blindness exists
23 where an alleged inducer believed there was a high
24 probability that its acts, if taken, would constitute
25 infringement, but the alleged inducer deliberately avoided

1 confirming that belief.

2 As with direct infringement, you must determine
3 whether there has been active inducement on a claim-by-claim
4 basis.

5 The Broetje Parties are liable for active
6 inducement of infringement of a claim only if AHG proves by
7 a preponderance of the evidence that:

8 1. The acts actually carried out by the third
9 party directly infringed the claim;

10 2. The Broetje Parties took action during the
11 time the '339 patent was in force intending to cause the
12 infringing acts by the third party; and

13 3. The Broetje Parties were aware of the '339
14 patent and (i) knew that the acts, if taken, would
15 constitute infringement of that patent; or (ii) the Broetje
16 Parties believed that there was a high probability that the
17 acts, if taken, would constitute infringement of the '339
18 patent but deliberately avoiding confirming that belief.

19 In order to establish active inducement of
20 infringement, it is not sufficient that the third party
21 directly infringed the claim. Nor is it sufficient that the
22 Broetje Parties were aware of the act or acts by the third
23 party that allegedly constitute the direct infringement.

24 Rather, you must find that the Broetje Parties specifically
25 intended that the third party infringe the '339 or that the

1 Broetje Parties believed there was a high probability the
2 third party would infringe the '339, but remained willfully
3 blind to the infringing nature of the third party's acts, in
4 order to find inducement of infringement.

5 For example -- assuming all of the other
6 requirements of inducing infringement that I have described
7 to you are satisfied -- an accused infringer can indirectly
8 infringe the patent in suit by selling the accused product
9 with instructions leading end-users to use the product as
10 claimed in the patent, since it is inferred that the
11 end-users follow those instructions with respect to the
12 accused product.

13 When considering whether the Broetje Parties
14 knew or acted with willful blindness, that the induced
15 actions would constitute infringement, you may consider all
16 of the circumstances, including whether or not the Broetje
17 Parties obtained the advice of a competent lawyer. There is
18 no affirmative duty to seek opinion of counsel regarding
19 infringement. However, opinion of counsel evidence -- or
20 lack of such evidence -- may be probative of whether the
21 Broetje Parties knew, or acted with willful blindness, that
22 its actions would cause direct infringement. While the
23 decision not to obtain an opinion of counsel may be
24 probative circumstantial evidence that a defendant knew, or
25 acted with willful blindness, that its action would cause

1 direct infringement, that fact cannot replace any of the
2 requirements to prove inducement.

3 If you find that no claim of the '339 patent has
4 been directly infringed, you cannot find the Broetje Parties
5 liable for inducement.

6 4.4. Indirect Infringement - Contributory
7 Infringement.

8 Contributory infringement occurs when a party
9 with knowledge of the patent supplies a part, or a
10 component, to another for use in a product, machine, or
11 process that infringes a patent claim. Contributory
12 infringement arises only if one who received the component
13 actually infringes a patent claim.

14 AHG asserts that the Broetje Parties have
15 contributed to another's infringement of the '339 patent.
16 In order to prove contributory infringement, AHG must show:

17 1. The Broetje Parties sell, offer to sell, or
18 import within the United States a component for use in a
19 process that infringes a claim of the '339 patent during the
20 time the '339 patent is in force;

21 2. The component is a significant part of the
22 invention of at least one claim of the '339 patent, and the
23 Broetje Parties knew that the component was especially made
24 to be used in a manner which infringed one or more of the
25 claims of the '339 patent; and

1 3. The component does not have a significant
2 noninfringing use.

3 All three of the requirements above must be
4 proven by direct or circumstantial evidence, by a
5 preponderance of the evidence, before you may find that the
6 Broetje Parties contributed to patent infringement. As with
7 direct infringement, you must determine contributory
8 infringement on a claim-by-claim basis, for each defendant.

9 4.5. Infringement Despite Accused Infringer's
10 Improvements.

11 Whether or not an Accused Product represents an
12 improvement over the inventions defined in AHG's patent
13 claims does not determine whether or not that product can
14 infringe the asserted patent claims. As long as an accused
15 product includes all of the elements of at least one of the
16 asserted patent claims, then the patent claim is infringed
17 by the Accused Product despite any improvements.

18 5.0. Willful infringement.

19 AHG alleges that the Broetje Parties infringed
20 the '339 patent and the '216 patent willfully. If you have
21 decided that the Broetje Parties have infringed one or more
22 of the asserted claims in the '339 patent or the '216
23 patent, you must go on and address the additional issue of
24 whether or not this infringement was willful.

25 Willfulness requires you to determine by clear

1 and convincing evidence that the Broetje Parties acted
2 recklessly. To prove that the Broetje Parties acted
3 recklessly, AHG must prove two things by clear and
4 convincing evidence.

5 The first part of the test is objective: AHG
6 must persuade you that the Broetje Parties acted despite an
7 objectively high likelihood that its actions would infringe
8 a valid patent. In making this determination, you may not
9 consider the Broetje Parties' state of mind. Legitimate or
10 credible defenses to infringement, even if not ultimately
11 successful, demonstrate a lack of recklessness.

12 Only if you conclude that the Broetje Parties'
13 conduct was reckless do you need to consider the second part
14 of the test. The second part of the test depends on the
15 Broetje Parties' state of mind. AHG must persuade you that
16 the Broetje Parties actually knew or should have known that
17 their actions constituted an unjustifiably high risk of
18 infringement of a valid patent.

19 To determine whether the Broetje Parties had
20 this state of mind, consider all facts, which may include,
21 but are not limited to:

22 1. Whether or not the Broetje Parties acted in
23 accordance with the standards of commerce for their
24 industry;

25 2. Whether or not the Broetje parties

1 intentionally copied a product of AHG that is covered by the
2 patents in suit;

3 3. Whether or not there is a reasonable basis
4 to believe that the Broetje Parties did not infringe or had
5 a reasonable defense to infringement; and

6 4. Whether or not the Broetje Parties made a
7 good faith effort to avoid infringing the patents in suit,
8 for example, whether the Broetje Parties attempted to design
9 around the patents in suit.

10 I'm now up to 6.0. Patent Invalidity.

11 Patent invalidity is a defense to patent
12 infringement. Even though the United States Patent Office
13 has allowed the claims of a patent, you have the ultimate
14 responsibility for deciding whether or not the claims of a
15 patent are valid.

16 For a patent to be valid, the subject matter
17 claimed in the individual claims of the patent must be new
18 and nonobvious. A patent cannot take away from the right of
19 anyone who wants to use what was already known or would have
20 been obvious to those of skill in the art at the time when
21 the invention was made.

22 The Broetje Parties have challenged the validity
23 of the asserted patents. In making your determination as to
24 invalidity, you should consider each claim separately.

25 6.1. Presumption Of Validity.

1 The granting of a patent by the Patent Office
2 carries with it the presumption that the patent's subject
3 matter is new, useful, and constitutes an advance that was
4 not, at the time the invention was made, obvious to one of
5 ordinary skill in the art. The law presumes that the Patent
6 Office acted correctly in issuing the patent. Nevertheless,
7 when the validity of a patent has been put at issue as part
8 of patent litigation, it is the responsibility of the jury
9 to review what the Patent Office has done consistent with
10 the Court's instructions on the law.

11 The Broetje Parties' burden of proof remains
12 exactly the same regardless of whether the references on
13 which the Broetje Parties are relying on to invalidate a
14 patent have been previously been before the Patent Examiner.
15 Thus, the Broetje Parties have the burden of proving
16 invalidity of each patent claim by clear and convincing
17 evidence.

18 6.2. Anticipation - Generally.

19 A person cannot obtain a patent on an invention
20 if someone else has already made the same invention. If the
21 invention is not new, we say that it was "anticipated" by
22 prior art. Prior art is the legal term used to describe
23 what others had done in the field before the invention was
24 made. Prior art is the general body of knowledge in the
25 public domain, such as articles or other patents before the

1 invention was made. It is not necessary that the prior art
2 has been available to every member of the public. It must
3 have been available, without restriction, to that segment of
4 the public most likely to avail itself of the prior art's
5 contents.

6 An invention that is "anticipated" by the prior
7 art is not entitled to patent protection. In order to prove
8 that an invention is "anticipated," a party must prove by
9 clear and convincing evidence that a single piece of prior
10 art describes or discloses all of the elements of the
11 claimed invention.

12 6.3. Anticipation - Previously Known Or
13 Published.

14 The Broetje Parties contend that the asserted
15 claims of the Asserted Patents are invalid because all
16 elements of each asserted claim existed in a single device
17 or method that predates the claimed invention, or were
18 described in a single previous publication or patent that
19 predates the claimed invention. In patent law, such
20 previous device, method, publication or patent is called a
21 "prior art reference." If a patent claim was disclosed by a
22 prior art reference, we say it is "anticipated" by a prior
23 art reference. The Broetje Parties must prove by clear and
24 convincing evidence that the claim was anticipated.

25 The disclosure in the prior art reference does

1 not have to be made in the -- does not have to be in the
2 same words as the claim. Instead, it is sufficient if
3 all requirements of the claim are in the prior art, either
4 stated or necessarily implied, so that someone of ordinary
5 skill in the field looking at that one reference would be
6 able to make and use at least one embodiment of the claimed
7 invention.

8 To meet this requirement, the Broetje Parties
9 must prove that their prior art reference would allow a
10 person of ordinary skill in the art to practice the claimed
11 invention without undue experimentation.

12 6.4. Anticipation - Inherency.

13 In determining whether the single item of
14 prior art anticipates a patent claim, you should take into
15 consideration not only what is expressly disclosed in the
16 from item of prior art, but also what is inherently present
17 or disclosed in that prior art or what inherently results
18 from its practice. Prior art inherently anticipates a
19 patent claim if the missing element or feature would be the
20 natural result of following what the prior art teaches to
21 persons of ordinary skill in the art. A party claiming
22 inherent anticipation must prove by clear and convincing
23 evidence that the claim is inherently anticipated. Evidence
24 outside of the prior art reference itself may be used to
25 show that the elements not expressly disclosed in the

1 reference are actually present. Mere probabilities are not
2 enough. It is not required, however, that persons of
3 ordinary skill actually recognized the inherent disclosure
4 at the time the prior art was first known or used. Thus,
5 the prior use of the patented invention that was
6 unrecognized and unappreciated can still be an invalidating
7 anticipation.

8 6.5. Obviousness.

9 In order to be patentable, an invention must not
10 have been obvious to a person of ordinary skill in the art
11 at the time the invention was made. A claimed invention is
12 invalid as obvious if it would have been obvious to a person
13 of ordinary skill in the field of the invention at the time
14 the invention was made.

15 Obviousness must be shown by clear and
16 convincing evidence considering one or more than one item of
17 prior art. Obviousness is determined from the perspective
18 of a person of ordinary skill in the field of the invention.
19 The issue is not whether the claimed invention would about
20 obvious to you as a layman, to me as a judge, or to a genius
21 in the art, but whether it would have been obvious to one of
22 ordinary skill in the art at the time it was made. Thus,
23 the question is, would it have been obvious for a skilled
24 person who knew of the prior art to make the claimed
25 invention? If the answer to that question is yes, then the

1 patent claims are invalid. The Broetje Parties have the
2 burden of proving obviousness by the clear and convincing
3 evidence standard.

4 The Broetje Parties contend that the Asserted
5 Claims are invalid because the claimed inventions are
6 obvious.

7 Keep in mind that the existence of each and
8 every element of the claimed invention in the prior art does
9 not itself prove obviousness. Most, if not all, inventions
10 rely on building blocks of prior art. Accordingly, you must
11 be careful not to determine obviousness using hindsight to
12 reconstruct or piece together the invention. Many true
13 inventions can be seen as obvious after the fact. You
14 should not consider what is known today or what was learned
15 from the teachings of the patent. You should not use the
16 patent as a roadmap for selecting and combining items of
17 prior art. You must put yourself in the place of a person
18 of ordinary skill in the art at the time the invention was
19 made.

20 You must also keep in mind that the test for
21 obviousness is not whether or not it would have been obvious
22 to try to make the invention, but rather, whether or not the
23 invention would have been obvious to a person of ordinary
24 skill in the inventor's field at the time the invention was
25 made. In determining whether or not these claims would have

1 been obvious, you should make the following determinations:

2 First. What is the scope and content of the
3 prior art?

4 Second. What differences, if any, are there
5 between the invention of the claim of the patent and the
6 prior art?

7 Third. What was the level of ordinary skill in
8 the art at the time the invention was made?

9 Fourth. Are there any objective indications of
10 nonobviousness?

11 6.6. Obviousness - Scope and Content of the
12 Prior Art.

13 As I have just instructed you, in arriving at
14 your decision on the issue of whether or not the claimed
15 inventions were obvious to one of ordinary skill in the art,
16 you must first determine the scope and content of the prior
17 art. This means that you must determine what prior art is
18 reasonably pertinent to the particular problem that the
19 inventors faced. Prior art is reasonably pertinent if it
20 is in the same field as the claimed invention or is from
21 another field that a person of ordinary skill would look
22 to in trying to solve the problem the claimed invention was
23 trying to solve. The prior art may include any of the
24 following items if received into evidence:

25 1. Patents that issued more than one year

1 before the earliest of the effective filing date of the
2 patents, which is December 8, 1988, or before the date of
3 the invention of the Asserted Claims of a particular patent;

4 2. Publications having a date more than one
5 year before the earliest of the effective filing date of the
6 patent, or before the date of invention of the asserted
7 claims of a particular patent;

8 3. U.S. patents or published applications
9 having a filing date prior to the date of the invention of a
10 particular patent;

11 4. Anything that was publicly known or used by
12 others in the United States before the claimed invention was
13 made; and

14 5. Anything that was in public use or on sale
15 in the United States more than one year before the effective
16 filing dates of the asserted patents.

17 6.7. Differences Between the Claimed Invention
18 and the Prior Art.

19 You must next consider the differences, if any,
20 between the prior art and the claimed invention from the
21 view of a person of ordinary skill in the art at the time
22 of the invention. Your analysis must determine the impact,
23 of any, of such difficulties on the obviousness or
24 nonobviousness of the invention as a whole and not merely
25 some portion of it.

1 In analyzing the differences between the claimed
2 invention and the prior art, you do not need to look for a
3 precise teaching in the prior art directed to the subject
4 matter of the claimed invention. You may take into account
5 the inferences and creative steps that a person of ordinary
6 skill in the art would have employed in reviewing the prior
7 art at the time of the invention. For example, if the
8 claimed invention combined elements known in the prior art
9 and the combination yielded results that were predictable
10 to a person of ordinary skill in the art at the time of the
11 invention, then this evidence would make it more likely that
12 the claim was obvious.

13 On the other hand, if the combination of known
14 elements yielded unexpected or unpredictable results, or
15 if the prior art teaches away from combining the known
16 elements, then this evidence would make it more likely that
17 the claim that successfully combined those elements was not
18 obvious.

19 Importantly, a claim is not proved obvious
20 merely by demonstrating that each of the elements was
21 independently known in the prior art. Most, if not all,
22 inventions rely on building blocks long since uncovered, and
23 claimed discoveries almost of necessity will likely be
24 combinations of what is already known. Therefore, you
25 should consider whether a reason existed at the time of the

1 invention that would have prompted a person of ordinary
2 skill in the art in the relevant field to combine the known
3 elements in the way the claimed invention does. The reason
4 could come from the prior art, the background knowledge of
5 one of ordinary skill in the art, the nature of the problem
6 to be solved, market demand, or common sense. Accordingly,
7 you may evaluate whether there some teaching, suggestion, or
8 motivation to arrive at the claimed invention before the
9 time of the claimed invention, although proof of this is not
10 a requirement to prove obviousness.

11 If you find that a reason existed at the time of
12 the invention to combine the elements of the prior art to
13 arrive at the claimed invention, this evidence would make it
14 more likely that the claimed invention was obvious.

15 Again, you must undertake this analysis
16 separately for each claim that the Broetje Parties contend
17 is obvious.

18 6.8. Obviousness - Level Of Ordinary Skill.

19 Obviousness is determined from the perspective
20 of a person of ordinary skill in the art to which the
21 claimed invention pertains at the time the claimed invention
22 was made. This person is presumed to know all the prior art
23 that you have determined to be reasonably relevant. When
24 faced with a problem, this ordinary skilled person is able
25 to apply his or her experience and ability to the problem

1 and also look to any available prior art to help solve the
2 problem.

3 Factors to consider in determining the level of
4 ordinary skill in the art include: (1) the educational
5 level and experience of people working in the field; (2) the
6 types of problems faced by workers in the art at the time of
7 the invention and the solutions found to those problems; (3)
8 the prior art patents, products or devices, and
9 publications, and (4) the sophistication of the technology
10 in the field at the time of the invention, including how
11 rapid innovations were made in the art at the time of the
12 invention.

13 AHG contends that a person of ordinary skill in
14 the art to which the '339 patent and the '216 patent pertain
15 would have at least three years of experience in the design
16 of rivet dispensing systems or held a Bachelor's degree in
17 mechanical engineering. The Broetje Parties contend that a
18 person of ordinary skill in the art to which the '339 patent
19 and the '216 patent pertain does not need to have any
20 particular level of education.

21 6.9. Obviousness -- Objective Criteria
22 Concerning Obviousness.

23 In evaluating the issues of obviousness, you
24 must also consider certain factors which, if established by
25 AHG, may indicate that the invention would not have been

1 obvious. No factor alone is dispositive, and you must
2 consider the obviousness of the invention as a whole. Some
3 of these indications are:

4 1. Commercial success or lack of commercial
5 success of products that are used to practice the claims of
6 the patent in suit;

7 2. A long-felt need in the art which was
8 satisfied by the invention of the patent in suit;

9 3. Failed attempts by others to make the
10 invention;

11 4. Copying of the invention by others in the
12 field;

13 5. Unexpected results achieved by the
14 invention;

15 6. Praise of the invention by the infringer or
16 others in the field;

17 7. The taking of licenses under the patents by
18 others;

19 8. Expressions of surprise by experts and those
20 skilled in the art at the making of the invention; and

21 9. The patentee proceeded contrary to accepted
22 wisdom of prior art.

23 However, there must be a connection between the
24 evidence showing any of these factors and either the claimed
25 invention, or the advantages that result from practicing the

1 claimed invention, if this evidence is to be given weight by
2 you in arriving at your conclusion on the obviousness issue.
3 For example, if commercial success of products that practice
4 the asserted patents is due to brand recognition, company
5 goodwill, advertising, promotion, salesmanship or the like,
6 or is due to features of the product other than those
7 claimed in the patent in suit, then any commercial success
8 may have no relation to the issue of obviousness.

9 6.10. Indefiniteness.

10 The patent laws require the claims of a patent
11 to be sufficiently definite that one skilled in the art can
12 determine the precise limits of the claimed invention. If a
13 claim is found to be indefinite the claim is invalid. The
14 amount of detail required to be included in claims depends
15 on the particular invention and the prior art, and is not to
16 be evaluated in the abstract but in conjunction with the
17 disclosure. If the claims, read in light of the disclosure,
18 reasonably apprise those skilled in the art of the proper
19 scope of the invention, and if the language is as precise as
20 the subject matter permits, then the claims are not
21 indefinite.

22 Simply because some claim language may not be
23 precise does not automatically render a claim invalid. When
24 a word or phrase of degree is used, it must be determined
25 whether the patent disclosure provides some standard for

1 measuring that degree. One must then determine whether one
2 of ordinary skill in the art would understand what is
3 covered when the claim is read in light of the disclosure.
4 Even if one needed to experiment so as to determine the
5 limits of the claims of the patent, that would not
6 necessarily be a basis for holding the claims invalid.

7 The Broetje Parties contend that the asserted
8 claims of the '339 patent are invalid for indefiniteness
9 because the term "peripheral guiding" is indefinite, since a
10 person of ordinary skill in the art cannot translate the
11 definition of that term into a meaningfully precise claim
12 scope. The Broetje Parties have the burden of establishing
13 indefiniteness by clear and convincing evidence.

14 I am going to stop there for tonight. I have
15 been reading for about an hour, and I don't think you should
16 be subjected to me reading any longer than that today. So
17 tomorrow we will pick up at Page 49 of the jury
18 instructions.

19 We will be able to begin tomorrow at 9:00. So
20 we will go back to our normal schedule. So please be here
21 in time to start at 9. We will take your orders for lunch.
22 I will read the remaining jury instructions. You will hear
23 closing argument . We will give you the verdict sheet. And
24 you will begin deliberating sometime tomorrow.

25 As always, no talking about the case, no

1 research or reading about the case.

2 Please have a very good evening. We will see
3 you in the morning.

4 (Jury left courtroom.)

5 THE COURT: I wanted to leave you a few minutes.
6 You can make your motion, because that does come out of your
7 time. You probably want to know how much time you have
8 left. So I turn to plaintiffs to make their motion. The
9 rest of you can have a seat.

10 MR. HOROWITZ: Your Honor, at this time the
11 plaintiffs would make their Rule 50 motion.

12 On the issues on which the plaintiffs carry
13 their burden, a reasonable jury could only find the
14 following with respect to the patent claims.

15 AHG owns all right and title to the '339 and
16 '216 patents.

17 F2C2 is the exclusive licensee of the '339 and
18 '216 patents.

19 The Broetje Parties directly infringe Claims 1,
20 2, and 6 of the '339 patent and Claims 1 and 2 of the '216
21 patent.

22 The Broetje Parties indirectly infringe the
23 asserted claims of the two patents either by inducement
24 and/or contributory infringement.

25 Infringement by the Broetje Parties was willful.

1 The Broetje Parties had notice of infringement
2 prior to filing of the lawsuit.

3 And the plaintiffs are entitled to damages as a
4 result of the above as set forth during Mr. Ellis's
5 testimony.

6 With respect to the other claims on which the
7 plaintiffs have the burden, AHG has a protectable trade
8 dress, and the Broetje Parties infringe it under the Lanham
9 Act.

10 The Broetje Parties' infringement was
11 intentional.

12 The Broetje Parties engaged in unfair
13 competition under the Lanham Act in common law.

14 Trade dress has been used in commerce as
15 distinctive and nonfunctional.

16 There is a likelihood of confusion between AHG
17 and Broetje's products because of the trade dress.

18 The Broetje Parties intentionally and wrongfully
19 interfered with plaintiffs' prospective economic advantage
20 as to customers seeking to purchase plaintiffs' products.

21 The Broetje Parties' unfair competition involved
22 malice, oppression, or fraud.

23 Also, the plaintiffs are entitled to damages as
24 a result of the above as set forth by Mr. Ellis.

25 And the parties have standing, including F2C2

1 and AHG.

2 With respect to the issues on which the
3 defendants carry the burden, a reasonable jury could not
4 find any claim of either of AHG's patents invalid as
5 obvious, anticipated, or indefinite.

6 No anticipation or obviousness with any
7 combination of Shinjo, Komaki, Brosene, Offutt, Engeln,
8 Minbirole, Offutt-Minbirole combined, or Shinjo-Komaki
9 combined with knowledge of rivets.

10 To the extent this is an issue for the jury,
11 plaintiffs' claims are not barred by the statute of
12 limitations.

13 As to trade dress, unfair competition and
14 intentional interference claims, equitable tolling applies
15 to the statute of limitations, and the continuous accrual
16 doctrine applies to the statute of limitations.

17 That is as fast as I can do it.

18 THE COURT: Very good.

19 MR. HOROWITZ: Thank you.

20 THE COURT: I am going to reserve on the motion.

21 Mr. Kelleher, happy to hear from you if you
22 wish.

23 MR. KELLEHER: We renew our earlier 50(a)
24 motion. And with regard to the issues on which we bore the
25 burden of proof, no reasonable jury could find the claims of

1 the '216 and the '339 patents are not invalid under Sections
2 102, 103 or 112 of the Patent Act.

3 No reasonable jury could find that AHG's lawsuit
4 was filed ineffective by law, with regard to their trade
5 dress claims, their unfair competition claims, and their
6 intentional interference with prospective economic advantage
7 claim.

8 THE COURT: Okay. I will reserve judgment on
9 that as well.

10 Anything plaintiffs wish to add?

11 MR. HOROWITZ: No, Your Honor.

12 THE COURT: Okay.

13 So, tomorrow, we will start at the ordinary
14 time. So be here at 8:30 and I will be available to discuss
15 any further issues. To the extent there is time, I will put
16 my thoughts on the record about the jury instructions. As I
17 said, you will see the verdict sheet some time tonight. I
18 don't know what time. But you will have it, and feel free
19 to use it as part of your closing arguments tomorrow, if you
20 wish.

21 That was it for me. Anything else from
22 plaintiffs?

23 MR. LINDVALL: No, Your Honor.

24 THE COURT: Anything from defendants?

25 MR. KELLEHER: It is fine to refer to the

1 instructions during closing argument?

2 THE COURT: It is definitely fine to do so.

3 Exactly.

4 Thank you. Have a good evening.

5 (Court adjourned at 4:21 p.m.)

6

7 I hereby certify the foregoing is a true and accurate
8 transcript from my stenographic notes in the proceeding.

8

9

/s/ Brian P. Gaffigan
Official Court Reporter
U.S. District Court

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